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Nov. 24

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THE

OHIO NISI PRIUS REPORTS

NEW SERIES. VOLUME XVII.

BEING REPORTS OF CASES DECIDED

BY THE

**SUPERIOR, COMMON PLEAS, PROBATE AND
INSOLVENCY COURTS OF THE
STATE OF OHIO.**

VINTON R. SHEPARD, EDITOR.

**CINCINNATI:
THE OHIO LAW REPORTER COMPANY.
1915.**

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EXERCISES

1. Let $f: \mathbb{R} \rightarrow \mathbb{R}$ be a function. Define $f^*: \mathbb{R} \rightarrow \mathbb{R}$ by $f^*(x) = f(x) + f(-x)$. Show that f^* is an even function.
2. Let $f: \mathbb{R} \rightarrow \mathbb{R}$ be a function. Define $f^*: \mathbb{R} \rightarrow \mathbb{R}$ by $f^*(x) = f(x) - f(-x)$. Show that f^* is an odd function.
3. Let $f: \mathbb{R} \rightarrow \mathbb{R}$ be a function. Define $f^*: \mathbb{R} \rightarrow \mathbb{R}$ by $f^*(x) = f(x) + f(-x)$. Show that f^* is an even function.
4. Let $f: \mathbb{R} \rightarrow \mathbb{R}$ be a function. Define $f^*: \mathbb{R} \rightarrow \mathbb{R}$ by $f^*(x) = f(x) - f(-x)$. Show that f^* is an odd function.

OHIO NISI PRIUS REPORTS

NEW SERIES—VOLUME XVII.

CAUSES ARGUED AND DETERMINED IN THE SUPERIOR,
COMMON PLEAS, PROBATE AND INSOLVENCY
COURTS OF OHIO.

ACTION FOR REINSTATEMENT OF LIFE INSURANCE POLICY.

Superior Court of Cincinnati.

**BENJAMIN HAAS ET AL V. THE MUTUAL LIFE INSURANCE
COMPANY OF NEW YORK.**

Decided, September 1, 1914.

*Life Insurance—Loan Made on Joint Policy—Note Not Paid and Policy
Surrendered—Company Could Not be Required to Retain Policy in
Force Until Reserve Value Was Exhausted—Cancellation of Policy
Terminated all Rights of the Insured Therein—Company Not Bound
to Report Reserve Value to the Insured.*

A paid-up, non-participating joint life policy of insurance for \$15,000 was pledged to the issuing company by the insured as security for the payment of a loan made to them by the company. The loan agreement provided that in the event of default in the payment of the loan at the time when it became due, the company might, without notice or demand for payment, cancel the policy, and apply to the payment of said loan the sum of \$8,469, "the customary cash surrender consideration allowed by the company as the surrender value of policies issued upon like terms and conditions." The loan was not paid at maturity, but the insured consented to the surrender of the policy in the manner provided for by the contract.

Held:

1. That since under the terms of the policy of insurance the insured were not entitled to the full reserve value of the policy they could not require the company to retain the policy in force until the amount of the loan with interest had exhausted the reserve value.
2. That if the "customary cash surrender consideration" represented the substantial value of the policy, the loan agreement was valid, and the surrender and cancellation of the policy effectually terminated the rights of the insured therein.
3. Under the facts of the case, the company was under no obligation to calculate and report to the insured the full reserve value of the policy so that the insured might determine whether it would be a profitable speculation for them to keep the policy in force.

Robertson & Buchwalter, for plaintiffs.

Stephens, Lincoln & Stephens, contra.

OPPENHEIMER, J.

On February 24th, 1886, the Mutual Life Insurance Company of New York issued its policy numbered 277,661, in the sum of \$20,000, upon the joint lives of Benjamin and Adolph Haas, of this city. This policy, which is designated as a "Limited Payment Five Year Distribution Policy," reads as follows:

"No. 277661 A.

"THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

"Age 37-35 Years

Amount \$20,000.

"Annual Premium for 20 years only \$1056.

"IN CONSIDERATION of the application for this policy which is hereby made a part of the contract, the Mutual Life Insurance Company of New York promises to pay at its Home Office in the city of New York, unto the firm of B. and A. Haas, of Cincinnati, in the county of Hamilton, state of Ohio, their successors or assigns twenty thousand dollars, upon acceptance of satisfactory proofs at its said office, of the death of *Benjamin or Adolph Haas, partners in said firm, the policy to mature upon the death of either of them*, during the continuance of this policy, upon the following conditions; and subject to the provisions, requirements and benefits stated on the back of this policy which are hereby referred to and made part hereof;

"The annual premium of ten hundred and fifty-six dollars and — cents, shall be paid in advance on the delivery of this policy, and thereafter to the company, at its home office in the city of New York on the twenty-fourth day of February in every year during the continuance of this contract, until premiums for 20 full years shall have been duly paid to said company.

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"IN WITNESS WHEREOF, the said the Mutual Life Insurance Company of New York has caused this policy to be signed by its president and secretary, at its office in the city of New York, the twenty-fourth day of February A. D. one thousand eight hundred and eighty-six.

"(Signed) RICHARD A. McCURDY,
President.
"W. J. EASTON,
"Secretary."

The "provisions, requirements and benefits" referred to, which appear upon the back of the policy, are as follows:

"PROVISIONS, REQUIREMENTS AND BENEFITS.

"*Payment of Premiums.* Each premium is due and payable at the home office of the company in the city of New York; but will be accepted elsewhere when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy, is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived. That part of the year's premium, if any, which is not due and is unpaid at the maturity of this contract shall be deducted from the amount of the claim. If this policy shall become void by non-payment of premium, all payments previously made shall be forfeited to the company except as hereinafter provided.

"*Dividends.* This policy is issued on the five year distribution plan. It will be credited with its distributive share of surplus apportioned at the expiration of each five years from the date of issue. Only policies in force at the end of such terms, and entitled thereto by year of issue, shall share in such distribution of the surplus, and no other distribution to such policies shall be made at any other time. All surplus so apportioned may be applied at the end of such periods to purchase additional insurance, or in payment of future premiums on this policy, if requested in writing, or may then be drawn in cash.

"*Paid-Up-Policy.* After three full annual premiums have been paid upon this policy, the company will, upon the legal surrender thereof before default in payment of any premium, or within six months thereafter, issue a non-participating policy for paid-up insurance, payable as herein provided, for the proportion of the amount of this policy which the number of full years' premiums paid bears to the total number required.

"*Surrender.* This policy may be surrendered to the company at the end of the fifth year from the date of issue, and eighty per cent. of the reserve computed by the American Table of

Mortality and four and one-half per cent. interest, and the surplus as defined above, will be paid therefor. If surrendered at the end of the second or of any subsequent five year period, the full reserve by the same standard and the surplus as defined will be paid. No cash value will be paid for a surrender at any other time or date.

“NOTICE.

“*Powers of Agents.* No agent has power on behalf of the company to make or modify this or any contract of insurance, to extend the time for paying a premium, to bind the company by making any promise, or by receiving any representation or information not contained in the application for this policy.

“*Assignments.* The company declines to notice any assignment of this policy until the original or a duplicate certified copy thereof shall be filed in the company’s home office. The company will not assume any responsibility for the validity of an assignment.

“The minimum cash surrender values referred to in the above surrender clause are as follows:

80% of reserve at end of fifth year	\$1,650.00
Full reserve at end of tenth year	4,676.00
Full reserve at end of fifteenth year	7,986.00
Full reserve at end of twentieth year	12,250.00
Full reserve at end of twenty-fifth year....	13,530.00.”

On March 20th, 1901, fifteen full annual premiums having been paid, the policy was surrendered, and a non-participating policy for paid-up insurance in the sum of \$15,000 was issued, in accordance with Clause 3 of the aforementioned provisions. The following stipulation was thereupon stamped upon the face of the policy:

“PAID-UP NON-PARTICIPATING LIFE INSURANCE.

“NEW YORK, March 20th, 1901.

“This policy having lapsed, for the non-payment of the premium due the *twenty-fourth* day of *February*, 1901, the same has been since that date, and is hereby continued as and for a paid-up policy for *fifteen thousand* dollars without participation in the surplus, and without any other right or privilege, whether of surrender value or otherwise, and said sum will be payable in one sum on receipt at the home office of satisfactory proof of the death of either one of the insured as stated.

“W. J. EASTON,

“*Secretary.*”

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During all this time Benjamin and Adolph Haas were partners, engaged in business in this city under the firm name of "B. & A. Haas." In 1907 this partnership was amicably terminated, and Benjamin Haas, together with his son, succeeded to the business under the firm name of "B. Haas & Son." Adolph Haas then removed to New York and went into business with his son and son-in-law at No. 46 E. 14th street.

For the purpose of making an equitable division of all the partnership assets, at the time of the dissolution, the brothers determined to ascertain what amount could be realized in cash upon this paid-up policy. Accordingly, on or about January 23d, 1907, they went to the office of the company in New York and made inquiry of the clerk at the loan window concerning the amount of money which might be obtained upon the policy, and the rate of interest which would be charged.

It is not entirely clear what language was used at that time, whether the inquiry was concerning the "equity," or "reserve," or "loan value" or "cash value." But the purpose of the inquiry is perfectly manifest. The Messrs. Haas were desirous of obtaining the largest possible sum of cash to be divided between themselves as part of the available assets of the firm.

They were told that the desired information could not be given to them by the loan clerk, who would have to submit the request to the actuarial department for calculation. They departed, and on their return later in the day were informed that the largest amount of cash which might be available to them was \$8,469, the loan value of the policy to March 28th, 1907. Again there is some conflict in the testimony as to the exact designation which was applied to that sum. But it is perfectly clear that this was the loan value estimated as of the next anniversary of the policy. It is also manifest that the loan value was given because it was greater than the cash surrender value at the time when the inquiry was made. The objection was then made by the Messrs. Haas that the value thus given was too low, more than \$15,000 having already been paid in by them, and at their request the entire matter was again submitted to the actuarial department for re-calculation. On the following day they returned, and were again informed that the amount here-

tofore stated was the greatest available sum. They then signified their willingness to accept it, and the following agreement, which apparently had already been prepared, was executed:

"THIS AGREEMENT made this 24 day of Jan., 1907, between THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, party of the first part, hereinafter called the Company, and Benjamin, Adolph, B. & A. Haas, party of the second part, WITNESSETH:

"The company agrees to loan to the party of the second part the sum of eight thousand four hundred and sixty-nine and 00/100 apportioned as follows:

"To pay premiums on Policy No. —, to — day of —

"Interest at 5% (adjusted also for interest on premiums), \$75.28.

"Balance by company's check, \$8,393.72. Total \$8,469.00.

"The receipt of the foregoing amount as a loan is hereby acknowledged upon the pledge as hereinafter set forth of Policy No. 277661 in said company, and the said party of the second part agree to repay the said sum of \$8,469 to the company at its head office, Nassau, Cedar, William and Liberty streets, in the city of New York, on the 28th day of March, 1907.

"IN CONSIDERATION of the amount of said loan the party of the second part hereby assign, transfer and set over all of their right, title and interest in and to said Policy No. 277661 issued by said company on the life of Benjamin Haas and Adolph Haas, together with any and all moneys which may be or become payable under the same, to the company as collateral security for the payment of said loan with interest, and the said party of the second part will forever warrant and defend the title of the said company to the said policy.

"In the event of default in the payment of said loan on the date when due as herein provided, or on the maturity of any extension or renewal of said loan, it is hereby mutually agreed that the company, without further notice and without further demand for payment, may cancel said policy, and apply to the payment of said loan (with interest, if any shall have accrued), the sum of \$8,469 (being the customary cash surrender consideration allowed by the company as the surrender value of policies issued upon like terms and conditions) and pay the remainder of said sum (if any), on demand, to the parties entitled thereto; the company, however, at its own option, may extend or renew from time to time said loan for one year, or less period, upon the payment of premium (if any is required) and interest in advance for such period and upon the written request of any one of the parties of the second part hereto, and without further notice to any other party of the second part.

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"In case of any extension or renewal or extensions or renewals of this loan, the foregoing provision for cancellation and surrender of the said policy shall be applicable in the event of default in the payment of said loan at the maturity of any such extension or renewal, but in such case, in lieu of the above stipulated cash surrender consideration, the company will pay, as a cash surrender value at the maturity of such extension or renewal, the customary cash surrender consideration allowed by the company on other policies issued and terminated upon like terms and conditions as this policy, which amount shall not be less than the above stipulated cash value.

"IN WITNESS WHEREOF, the said parties have executed these presents the day and year first above written.

"Witness: A. E. Andrews, Notary Public, as to both and all signatures.

"BENJAMIN HAAS,

"Insured.

"Cincinnati, Ohio.

"Address.

"ADOLPH HAAS,

"Cincinnati, Ohio.

"B. & A. HAAS,

"by ADOLPH HAAS."

In accordance with this agreement the policy of insurance was hypothecated with the company, and a receipt therefor, signed by the superintendent of policy loans, was given to them.

It will be seen that the interest, calculated at the rate of 5%, was deducted to March 28th, 1907, and a check for \$8,393.72 was given to the insured.

Through an oversight on the part of the company, no notice of the maturity of this loan was sent to the insured on or before March 28th, 1907, and nothing was done by the insured in reference thereto. On May 15th, 1908, the following letter was sent to Mr. Benjamin Haas:

"THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

"Nassau, Cedar, Liberty and William Streets.

"Policy Loan Department. NEW YORK, May 15, 1908.

"BENJAMIN HAAS, Esq.,

"S. E. Corner 3d & Elm St.,

"Cincinnati, Ohio.

"Dear Sir: On January 24, 1907, a loan of \$8469 was made under your policy No. 277,661, said loan to mature on March 28,

1907. Through an oversight on our part we neglected to send you due notice of the maturity of this loan, and now beg to enclose herewith a renewal request extending the loan from March 28, 1907, to September 28, 1908.

"Will you be kind enough to sign this request and return to us with your cheque for \$661.60, being the amount necessary to cover the interest to September 28, 1908.

"Yours truly,

"(Signed) F. W. MERCER,
Sup't of Policy Loans."

"Enc. M.R.—F.S."

Enclosed with this letter was a loan extension request as follows:

"LOAN EXTENSION REQUEST.

"THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK.

"Loan No. 107453.

5/15, 1908.

"The undersigned hereby requests The Mutual Life Insurance Company of New York, to accept the sum of \$661.60 tendered herewith, as interest, upon loan of \$8,469.00 due March 28, 1907, secured by pledge of Policy No. 277661 as collateral. The undersigned also requests the said Company to extend the time for payment of the said loan from said March 28, 1907, to Sept. 28, 1908.

"The company may, at its own option and without request by the parties or notice to them, make from time to time further extensions of the time of payment of principal of said loan.

"Interest earned \$.

"Interest unearned \$. Borrower.

"Computed by Checked by

"Address."

The amount thus required as a payment for the extension of the loan, \$661.60, was the interest on the original loan at 5%, calculated to September 28th, 1908, to which date the loan would have been extended by the company in the event of the payment of that sum.

This letter and enclosure were immediately forwarded by Mr. Benjamin Haas to his brother, Adolph Haas, and the latter, who then resided in New York, thereupon called at the office of the company to make further inquiry concerning the loan. After a conversation with one of the clerks in the policy loan

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department, he determined that it would be unwise to pay the required sum for the purpose of keeping the policy and loan in force, and consented to a surrender of the policy. The words "surrender policy" were then written across the face of the letter by the company's clerk, and the policy was started through for surrender, the process being completed on May 28th, 1908. Thereupon, Mr. Adolph Haas wrote to his brother and informed him what had been done, adding that because of the company's oversight the policy had remained in force for more than one year longer than would otherwise have been the case, and that the insured were "nothing out and nothing in" by the error. Mr. Benjamin Haas then made further inquiry concerning what had taken place, and was informed that no document had been signed by the brother, the policy having been merely forfeited by the company. He was also informed that the brother had inquired about the "equity" in the policy, and was told that they had had one year's insurance to which they were not entitled.

On December 8th, 1908, Adolph Haas died, and ten days later Benjamin Haas furnished proof of death. The company, however, refused to pay the claim, whereupon this suit was instituted by Benjamin Haas and the Administrators of the Estate of Adolph Haas to set aside the surrender and require the reinstatement of the policy, and to recover the sum of \$5,801.74, with interest from December 18th, 1908, being the amount of the face of the policy less the loan with interest at the rate of 5%.

Plaintiffs' claim is based upon the contention that the amount due to the insured on January 24th, 1907, was only the loan value; that at that time the actual reserve value of the policy (calculated as of March 28th, 1907, the date of the maturity of the loan) was in excess of \$9,475; that the reserve value of the policy on May 28th, 1908, was in excess of \$9,668, and that the reserve value of the policy at the time of Adolph Haas's death was in excess of \$9,764. In other words, plaintiffs contend that the "equity" in the policy was sufficient to cover the loan with interest up to the date of Adolph Haas's death, and that therefore the company had no right to cancel the policy. We are

thus confronted with the question whether the insured were at the various times mentioned—particularly at the time when the loan was made—entitled to the *reserve value* of the policy, either as an actual advancement or as a credit in their favor for the purpose of calculating their “interest” or “equity”

It is manifest that the policy is decidedly illiberal in its terms. Indeed, under the laws now in force, both in the state in which it was issued and in this state, no such policy could be written. But it will be remembered that at the time when the policy was issued, joint-life policies were comparatively infrequent. Indeed, there is testimony tending to show that only one policy of this precise character—a joint-life policy on brothers who were also partners—had then been issued by the defendant company, and that this policy was also held by Cincinnatians. It is not our privilege to re-write contracts for the company or its patrons, and in the absence of legislation nullifying the provisions of such contracts, we are compelled to interpret them as we find them, albeit we may construe its provisions strictly against the company by which they were written, and in favor of the insured.

In the first place, when the policy was originally surrendered, and a policy for paid-up insurance was issued in its place, the paid-up policy was by express agreement without right of participation in the company's surplus, and “without any other right or privilege, whether of surrender value or otherwise.” The company was under no contractual obligation to allow any cash value or to make any loan upon the policy. And we are concerned only with contract rights, not with “abstract morality”—whatever that may mean. Now at the time when this policy was written it appears that the company made no loans whatever. In 1898, in answer to popular demand, the company started a loan department, and the privilege of making loans was ultimately extended to all policy holders, whether the policy expressly negatived the right to a loan or not. Accordingly in this case the loan and surrender values were calculated and allowed although the insured were not contractually entitled thereto.

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It is not difficult to determine what the cash surrender or the loan value of the policy may be at a given date, and it is not contended that either the cash or loan value was incorrectly stated to the insured at the time when the loan was made and when the policy was surrendered. But plaintiffs contend that the inquiry of the insured was directed toward ascertaining the full *reserve* value of the policy, and that they were entitled to know this. They allege that if the insured had been correctly advised concerning this value they would undoubtedly have continued the policy in force; and that inasmuch as the reserve value was in excess of the amount of their loan with interest, the company was bound to keep it in force until the reserve value was exhausted. Of course we may only speculate as to what the insured would have done if other information had been given them, but for the purpose of the case we may assume that plaintiffs' contention is correct.

The only reference in the policy to any "reserve" is in the last clause of the "provisions" upon the back. It is there stated that the minimum cash surrender values shall at stated intervals, be a certain portion of, or the full "reserve" at those times. But it is further provided that "no cash value will be paid for a surrender at any other time or date." Accordingly the insured were not, as of right, entitled to a cash value at the time when the loan was made by the company. We are therefore restricted in our inquiry to the sole question whether, on May 28, 1908, the insured were entitled to have the benefit of the full reserve value of the policy, or, to put the matter conversely, whether the company was bound to allow to the insured the full reserve value. The loan agreement described the amount to which they were entitled as "the customary cash surrender consideration allowed by the company as the surrender value of policies issued upon like terms and conditions." This language is by no means definite. It may signify different things at different times. But its meaning may be definitely ascertained at any particular time, and the testimony indicates that in the present case the "customary" surrender and loan values were accurately calculated and quoted.

Plaintiffs seek to show that their inquiry was, both at the time when the loan was made and at the time when the policy was surrendered, concerning the "reserve value" of the policy. This term is used by Mr. Benjamin Haas interchangeably with "equity." But the meaning which he attached to the expression is apparent from the purpose which the brothers had in mind when the loan was made, as well as from his testimony both at the time of trial and previously when his deposition was taken. The Messrs. Haas were dissolving their partnership and dividing their tangible assets. This policy was an asset of the partnership. The only manner in which it could be divided was by immediately realizing as much cash as possible thereon, and dividing the cash. They apparently had no desire to make a loan as such. The loan value was accepted because, as computed by the company, it was greater than the cash surrender value. And it is significant, as counsel point out, that the word "reserve" never occurs in any of plaintiff's correspondence *ante litem motam*.

But it will be helpful in the determination of the case to ascertain the significance of the expression "reserve value." Ordinarily a policy holder knows nothing about "reserves." This is by no means strange for ordinarily a policy holder has nothing to do with them. He makes no inquiry concerning them, this being usually left for those who represent his estate after his death. A policy of life insurance is a contract between two parties. Their mutual rights and obligations are determined solely by the provisions of that contract, so far as it is not in conflict with the law. Unless the contract makes the reserve value available to the insured, he is not concerned with it. Moreover a reserve value is a mere abstraction. It is defined in the Standard Dictionary (Ed. 1913, p. 2092) as "the amount *theoretically* accumulated at any given time on a company's outstanding policies, which amount must *in theory* be held to enable the company, aided by future income, to meet future obligations on these policies." [Italics ours.] In other words, it is an amount which, if capitalized at a specified rate of inter-

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est, will, according to a certain basis of life expectancy, ultimately produce the face value of the policy. It is a mere guaranty of solvency designed to protect the insured against loss. It is a creature of the law. The insurer is under no contractual obligation to establish such fund, but is required to do so by statute. Nor can it properly be said that the reserve will at any specified time be a definite amount, for the rate of interest and the mortality table adopted as a basis of calculation may vary from time to time. Thus, it appears from the testimony that at the time when this policy was issued the company was required by the laws of New York to report all reserves on the basis of the American Table of Mortality, assuming $4\frac{1}{2}\%$ interest; subsequently the law was amended so as to require the so-called Actuaries' Table, with interest calculated at 4% ; after the Armstrong investigation in New York, this was again altered so as to require the use of the American Table of Mortality, assuming $3\frac{1}{2}\%$ interest, and since January 1, 1907, the American Table of Mortality with 3% interest has been employed. It will, of course, be borne in mind that the amount of the reserve increases as the rate of interest on which the reserve is computed decreases. When this loan was made, therefore, the American Table with 3% interest was employed by the company in ascertaining reserve values on all new business, and the same table with $3\frac{1}{2}\%$ interest on all old policies. But plaintiffs seek to require that the computation in this case be made on a $4\frac{1}{2}\%$ basis because of the surrender provision in the policy. But we have already shown that the contingency upon which this provision was applicable had never come into existence.

Plaintiffs have assumed throughout that an inquiry concerning the "equity" in the policy obligated the defendant to advise them concerning the "reserve" value. This, however, is by no means apparent to us. Indeed, we do not think that an insurer ordinarily understands "equity" and "reserve value" to be synonymous terms. We have already defined the latter; the former is usually employed to signify the amount which may be due to the insured in paid-up insurance, extended insurance or in cash, under the contract.

Let us consider what the relative positions of the insurer and the insured would have been if, in May, 1908, Adolph Haas had paid the interest demanded by the company as a condition precedent to the further carrying of the loan. The insurance would have remained in force, less the amount of the loan, until September 28th, 1908. At that time the full reserve upon the policy, estimated according to the American Table of Mortality and $4\frac{1}{2}\%$ interest, was approximately \$9,718; the amount of the loan without interest was \$8,469, or approximately \$1,249 less than the full reserve value upon the policy. What the insured would have determined to do on September 28th, 1908, is, of course, problematical. But it must be borne in mind that the company would then have had a perfect right under the contract to refuse to carry the loan any longer and to have required a surrender charge for the full amount allowed by law in such case. The surrender charge does not appear to be fixed in any manner. It is simply a sum required by the insurer to be paid in order to reimburse it for adverse selection, or, as defined by one of the witnesses in this case, "a repayment to the company of the damage presumably caused by the withdrawal of healthy lives," the assumption being that a man in poor health will not surrender his policy. This charge is recognized as perfectly legitimate and, as the amount thereof was in this case indefinite, the amount of the loan which the company would be willing to grant under the policy in its paid-up form was entirely optional. But it would seem that all that the company could, under the law of New York, have allowed to the insured on September 28th, 1908, would have been the difference between the full reserve, and the loan with interest, in cash or paid-up insurance.

As we have heretofore indicated, we believe that plaintiffs' position is based upon a misapprehension as to their contractual rights under the policy. The company was not compelled at any time to make the loan. It was under no obligation to fix a cash surrender value upon the policy in its paid-up form, i. e., after it had been surrendered for paid-up insurance. There was no provision for the allowance in cash of the reserve value at

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any other than the various five year periods mentioned in the policy, and then only upon condition that the policy continued in force in its original form.

Plaintiffs cite the case of *Palmer v. Ins. Co.*, reported in 114 Minn., 1, and 121 Minn., 395, as conclusive of the case at bar. An examination of that case, however, reveals many vital differences of fact, while the law which is applied to the facts will hardly serve plaintiffs' purposes. In that case the policy had, by its very terms, become paid-up and participating. It contained no agreement as to surrender or loan value. The insured borrowed the sum of \$1,445 and pledged the policy under a contract similar to that executed in the case at bar. He then failed to pay the loan at maturity, whereupon defendant *without notice to him* canceled the policy and notified him of this action. Palmer *immediately* protested, demanded a reinstatement of the policy and offered to pay the amount of the loan with interest. This offer was declined by the company, and suit was brought upon the policy after the death of the insured. The judgment of the lower court was reversed for a *misconstruction of the pleadings*. The loan agreement was sustained, and the cancellation was set aside because the value of the policy was so largely in excess of the amount due at the time of the cancellation as to indicate that the company had exacted an unreasonable penalty. The court found the cash surrender value (ascertained by deducting a surrender charge of about 10%, and an expense charge, technically known as "loading," of about 5% from the reserve value) to be \$1,986.25, so that the profit upon the surrender was almost 30%. In the case at bar no such proportion is apparent. Indeed, a surrender charge of the proportion recognized as permissible in the Palmer case would not, on September 28th, 1914, have left enough even of the reserve value (assuming that the insured had any interest in the reserve) to pay the interest on the loan for another year, so that the company could not have carried it for that period if it had desired to do so.

Plaintiffs also contend that the testimony indicates that the notice of maturity of the loan was sent only to Benjamin Haas;

that there is no evidence that any notice was ever sent to Adolph Haas, and that under the law of New York a cancellation under such circumstances was improper. In the first place, however, the law to which reference has been made has no bearing on this case. It refers exclusively to premiums or interest on premium notes "required by the policy to be paid." In the second place, Adolph Haas had actual notice. The notice which had been sent to Benjamin Haas was by him forwarded to his brother who then personally visited the offices of the company, and voluntarily agreed to surrender the policy and permit its cancellation. Under such circumstances failure to furnish written notice can not possibly be relied upon.

Numerous matters have been referred to by counsel, both in their elaborate and interesting arguments and in their scholarly and comprehensive briefs; but we deem it sufficient to base our opinion solely upon the interpretation of the contract of insurance which fixed the mutual obligations and privileges of the parties. We see nothing in the case to justify the exercise of the extraordinary powers of a court of equity, and the relief prayed for is accordingly denied.

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DENIAL OF JUDGMENT FOR THE FRUITS OF AN ILLEGAL CONTRACT.

Common Pleas Court of Franklin County.

MCCALL COMPANY v. PATRICK J. O'NEIL.

Decided, November 12, 1914.

Anti-Trust Law—Violation of—By Fixing the Price at which Goods May be Resold—Recovery from the Vendee Denied—Articles Covered by Patent Covered by the Same Rule When Sold Under an Illegal Contract.

1. The contract involved in this action undertakes to fix the price at which the goods sold may be resold by the purchaser, with a provision that for a breach of any of the terms or conditions of the contract the other party shall have the right to exercise the option to be relieved from its obligations and to recover the sum therein provided as liquidated damages. Such a contract is clearly within the inhibition of the Ohio anti-trust statute, and is therefore void; and a court will not lend its aid to a party relying on such a contract and seeking to recover its fruits, notwithstanding the purchaser may, as a consequence, be relieved from paying for goods he has received.
2. This rule with reference to contracts in violation of the anti-trust law applies with the same force in cases where the goods so sold are covered by a patent.

Watson, Stouffer, Davis & Gearhart, for plaintiff.

Ralph Henney and M. L. Bigger, contra.

BIGGER, J.

The action is upon an account. By agreement of the parties a jury was waived and the case is submitted to the court upon the following agreed statement of facts:

“The plaintiff is a corporation, and on or about the 13th day of May, 1910, it entered into a contract with the Davis Pennell Company, a corporation of Columbus, Ohio, which contract is hereto attached; that said contract continued to be and remained in force as between said parties until about the 13th day

of February, 1912, when said the Davis Pennell Company having sold and transferred its business, including its right and interest to and in said contract, to the defendant, said defendant assumed all the obligations of said contract on the part of said the Davis Pennell Company to be performed, including a standing credit of \$100; and the plaintiff consented in writing to the said transfer of said contract and obligations to defendant. Between the 1st day of February, 1912, and December 8th, 1912, both dates inclusive, plaintiff sold and delivered to the defendant under said contract goods and merchandise of the amount and value of \$379.25; that during said period defendant paid and was given credit for goods returned in the sum of \$234.38, leaving a balance unpaid of \$144.87; that in the month of January, 1913, defendant failed and refused to pay said sum of \$144.87 and has never since paid the same or any part thereof; that upon defendant's failure to pay said sum, plaintiff exercised what it alleges as its right and option provided in said contract to be released therefrom and all future obligations arising out of the same, and gave to defendant two weeks' notice in writing to make said payments and of its intention to exercise its option to be released from the obligations of said contract and of its intention to claim liquidated damages as therein provided; that there then remained an unexpired term of said contract of thirty-one months during which, according to its terms, defendant had agreed to order thirty-one monthly issues of patterns of not less than \$15 per month, amounting during said term to \$465; also thirty-one monthly issues of fashion sheets consisting of 13,000 fashion sheets at \$7.50 per thousand, amounting to \$97.50; also thirty-one monthly issues of McCall's large catalogues, consisting of 167 numbers at 17½ cents each, amounting in all to \$12.53; also thirty-one monthly issues of magazines consisting of 310 numbers at 3 cents each, amounting in all to \$9.30, making the total amount of goods to be ordered by defendant and delivered by plaintiff for said unexpired term of said contract, the sum of \$484.33. Plaintiff claims under the provisions of said contract and the exercise of the alleged right of option aforesaid and the giving of said notice, there then became due and owing to the plaintiff two-thirds of said sum of \$494.33, or a total of \$389.55; that no part of said \$389.55 has been paid; that no part of said \$144.87 as balance due for merchandise or no part of said \$100 as a standing credit has been paid and that plaintiff claims against the defendant \$634.32, with interest from February 1st, 1913.

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"It is further stipulated and agreed that the McCall Company have sold all of their goods and their customers have sold all of the goods purchased from the McCall Company at catalogue retail prices, as stipulated and provided in the contract referred to herein; that defendant, O'Neil, by virtue of the contract herein sued upon could sell the patterns to be purchased under said contract at such uniform catalogue retail prices and at no other price; that the McCall Company has customers selling these patterns in every city of the United States of 10,000 inhabitants or more, at such uniform catalogue prices and at no other prices."

The contract attached is as follows:

"COLUMBUS, OHIO, 4-29, 1910.

"THE MCCALL COMPANY,

"New York City, N. Y.

"Please deliver to freight at New York City, addressed to us a stock of McCall Patterns, at the uniform price of 7½ cents for each pattern (excepting those retailed for 10 cents, the price of which is 5 cents each), amounting to \$200 net, including the June issue, to be paid ten days after date of shipment; also ship us each month by cheapest route not exceeding an average of \$15 per month of your selection of the new monthly patterns, at same prices as above, commencing with July issue; also Fashion Sheets and other publications in quantities, and at prices specified on the reverse side of this form, during the term of this contract, commencing with June issue.

"We will re-order at the prices above named, once each week, or oftener, patterns sold, thus keeping patterns on hand as above specified. The patterns are not to be sold for other than catalogue retail prices, and the stock of patterns is to be kept and offered for sale on the first (main) floor. We will send you an inventory of our stock of patterns on hand at your request, not exceeding twice each year.

"All goods ordered for delivery after the first stock are to be paid for on or before the 5th day of the month succeeding date of shipment; if not then paid, subject to sight draft. All prices quoted are net.

"DISCARDED PATTERNS.

"All patterns purchased from you under this contract-order that are reported discarded by you semi-annually—January and

July—can be returned by us at contract price, in exchange for other patterns at full contract price, at any time within sixty days from the date such discarded patterns are respectively reported by you, provided this contract shall be in force at the time of such return. All patterns returned by us under any such discard report are to be credited to a special account, to be known as our discard exchange account, the credit to same to continue for a period of six months from the date of such discard report unless this contract shall be sooner terminated; and all patterns ordered by us within such period of six months and while this contract is in force, excepting our monthly standing order, shall be charged to such discard exchange account unless our credit to the same is earlier exhausted.

“If either of us shall intentionally break any of the above terms or conditions of this contract, and refuse or fail, after two weeks’ notice in writing given by the other, promptly to perform any of said terms or conditions, then the other of us shall have the right to exercise the option of being released from all future obligations under this contract, and to recover and receive, as liquidated damages and not as penalty, a sum equal to two-thirds of the agreed charge for all goods the contract provides shall be delivered during the remaining term of the contract after the breach is committed. Failure to require compliance with the strict letter of this contract-order shall not forfeit nor prejudice any right thereunder, nor constitute a waiver thereof. Failure to pay for any shipment under this agreement for three months after the same shall become due and thereafter for two weeks subsequent to notice from you, in writing, shall be deemed an abandonment and total breach of this contract on our part, and shall entitle you to exercise the option of being released from all future obligations under this contract and to recover, as liquidated damages and not as a penalty, the sum hereinabove agreed to be paid as liquidated damages for any breach of the above terms or conditions of this contract.

“We will not transfer the stock of McCall Patterns from No. 454 E. Long Street without your written consent, and will pay all transportation charges to and from your New York Office.

“We will not sell any other patterns than the McCall Patterns received from you during the term of this contract-order.

“This contract is to remain in force from date, and for five years after first shipment of patterns, and thereafter until the expiration of three months’ notice given by either party in writing, subsequent to the expiration of such five years.

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"All terms are herein printed or written. Signed in duplicate after being read.

"Date 4-29, 1910.

Purchaser's Signature:

"THE DAVIS PENNELL CO.,

"per EARL J. PENNELL, *Sec., Treas.*

"GUARANTEE AGAINST LOSS IN PATTERNS.

"It is agreed that at the end of five years and three months from date of first shipment of patterns, provided this contract shall have continued in force so long, the above purchaser may take an invoice of the stock patterns on hand, purchased under this contract, and if the result of the business shows that the above purchaser has paid us more cash for patterns purchased under this contract than has been received for them, we will, upon demand made by such purchaser and receipt of the patterns in good salable condition at our New York Office within thirty days after the expiration of such five years and three months, pay such loss in cash, provided all terms of this contract have been complied with.

"The above contract-order is accepted subject to the approval of the home office.

"Date 4-29, 1910.

"THE MCCALL COMPANY,

"By O. L. TRAVIS."

There are some other provisions supplemental to these, but they do not in any way vary or affect the terms of the contract here recited or their legal effect.

Briefs have been submitted in which counsel have discussed at considerable length the provisions of this contract with reference to what is denominated liquidated damages; the plaintiff contending that the provision therein is really one for liquidated damages, while the defendant's counsel contends that construing the contract as a whole this provision should be held to be only in the nature of a penalty, inserted for the purpose of compelling compliance with the provisions of the contract, and therefore not enforceable.

Counsel for the defendant also presents another question, which is that this contract is one which is contrary to public policy and in contravention of the anti-trust law of this state. This question is logically first in order: for if the contract is

unenforceable there will be no occasion to consider and determine the other questions presented in argument.

It is a well settled principle of law that courts will not lend their aid to the enforcement of illegal contracts. Is this an illegal contract?

Section 6391 of the General Code provides that:

"A trust is a combination of capital, skill or acts by two or more persons, firms, partnerships, corporations or associations of persons for any or all of the following purposes: * * *

"4. To fix at a standard or figure, whereby its price to the public or consumer is in any manner controlled or established, an article or commodity of merchandise, produce or commerce intended for sale, barter, use or consumption in this state.

"5. To make, enter into, execute or carry out contracts, obligations or agreements of any kind or description, by which they bind or have bound themselves not to sell, dispose of or transport an article or commodity, or an article of trade, use, merchandise, commerce or consumption below a common standard figure or fixed value, or by which they agree in any manner to keep the price of such article, commodity or transportation at a fixed or graduated figure, or by which they shall in any manner establish or settle the price of an article, commodity or transportation between them or themselves and others so as directly or indirectly to preclude a free and unrestricted competition among themselves, purchasers or consumers in the sale or transportation of such article or commodity," etc.

Such combinations are declared to be unlawful, against public policy and void.

Now, this contract by its terms undertakes to fix the price at which the articles sold shall be re-sold by the purchaser. The contract then provides that for a breach of any of its terms and conditions the other party should have the right to exercise the option to be released from its obligations and to recover the sum therein provided as liquidated damages.

That such an agreement falls clearly within the inhibition of the anti-trust statute seems too clear to admit of any doubt. In its terms the price at which these articles are to be sold to the public is fixed and determined by the agreement, and they are to be sold at that price and at no other price. Clearly, this pro-

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vision of the contract is unlawful under the statute of this state, contrary to public policy, and void. Unquestionably the plaintiff could not upon the agreed statement of facts call upon the court to enforce this provision of the contract. There is nothing in the agreed statement of facts to show that these articles are patented articles; but counsel for the plaintiff in argument makes the statement that the articles sold to the defendant were in fact patented articles, and asks that the plaintiff may be permitted to show that fact. After careful consideration, however, I have reached the conclusion that even if that were established it would not change the situation in so far as the right of the plaintiff to recover is concerned. It was long a mooted question as to what extent, if at all, a patentee might by agreement control the price at which the vendee might resell a patented article. This question was, however, finally settled by a decision of the Supreme Court of the United States. That court first decided in the case of *Bobbs-Merrill*, at 210 U. S., 339, that this right did not exist under the copyright statute, but expressly reserved its decision as to whether or not it existed under the patent law. This question was, however, finally presented for decision in the case of *Bauer & Cie v. O'Donnell*, 229 U. S., 1.

The following is the syllabus in that case:

"The right to make, use and sell an invented article existed without and before the passage of the patent law. The act secured to the inventor the exclusive right to make, use and vend the thing patented.

"While the patent law should be fairly and liberally construed to effect the purpose of Congress to encourage useful inventions, the rights and privileges which it bestows should not be extended by judicial construction beyond what Congress intended.

"In framing the patent act and defining the rights and privileges of patentees thereunder, Congress did not use occult phrases but in simple terms gave the patentee the exclusive right to make, use and vend his invention for a definite term of years, and a patentee may not by notice limit the price at which future retail sales may be made, such article being in the hands of a retailer by purchase from a jobber who has paid to the agent of the patentee the full price asked for the article sold. * * *

"When the transfer of a patented article is full and complete,

an attempt to reserve the right to fix the price at which it shall be resold by the vendee is futile under the statute. It is not a license for qualified use, but an attempt to unduly extend the right to vend.

"While the patent law creates to a certain extent a monopoly by the inventor in the patented article, a patentee who has parted with the article patented by passing title to the purchaser has placed the article beyond the limits of the monopoly secured by the act."

This decision puts at rest the hitherto mooted question of the right of a patentee to control the price at which the patented article may be sold where it is sold outright to a purchaser, as in the case at bar. It being established, therefore, by this decision that the patent law of the United States does not confer this right upon patentees, it follows that such patentees are not immune by virtue of the patent law from the provision of the anti-trust statute.

As I understand the argument of plaintiff's counsel, it is claimed that even if the court should conclude that this provision of the contract is illegal, that notwithstanding that, since the defendant obtained the goods he should not be permitted to escape payment by reason of this provision of the contract, and that it should have no effect upon the right to recover upon the account here sued upon. But I can not concur in this view of the effect of this provision, having reached the conclusion that it is unlawful, contrary to public policy and void. It is undoubtedly true that the mere fact that a vendor may be engaged in a combination in restraint of trade or tending to the establishment of a monopoly will not constitute a defense to a vendee who has purchased an article manufactured and sold by the illegal trust or combination. If the contract of sale is collateral to and in no wise connected with the illegal agreement effecting the unlawful combination or trust, the unlawful character of the combination or trust from which the article is purchased is no defense. The rule is, however, different where the vendor relies upon the illegal contract for recovery, as in this case.

Authorities upon this proposition might be multiplied, at great length, but the principle is nowhere more clearly decided than

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in the case of *Wall Paper Co. v. Voight & Sons Co.*, 212 U. S., 227. This case is in principle a parallel to the one at bar upon this question, inasmuch as it is a suit upon an account for goods sold and delivered, and the court refused its aid to enforce the contract for the purchase price of the goods for the reason that the contract itself contained provisions which were a violation of the federal anti-trust law. The syllabus in that case is as follows:

“Where a number of manufacturers situated in different states engaged in manufacturing an article sold in different states organize a selling company through which their entire output is sold, in accordance with an agreement between themselves, to such persons only as enter into a purchasing agreement by which their sales are restricted, the effect is to restrain and monopolize interstate and foreign trade and commerce, and is illegal under the anti-trust act of July 2, 1890.” C. 647, 26 Stat., 209; and so held in regard to a combination of wall paper manufacturers.

“While a voluntary purchaser of goods at stipulated prices under a collateral independent contract can not avoid payment merely on the ground that a vendor was an illegal combination (*Connolly v. Union Sewer Pipe Company*, 184 U. S., 540), a vendee of goods purchased from an illegal combination in pursuance of an illegal agreement can plead such illegality as a defense.”

“The court can not lend its aid in any way to a party seeking to realize the fruits of an illegal contract; and while this may at times result in relieving a purchaser from paying for what he has had, public policy demands that a court deny its aid to carry out illegal contracts, without regard to individual interests or knowledge of the parties.”

“A refusal of judicial aid to enforce illegal contracts tends to reduce such transactions.”

A case reported in 9 N.P.(N.S.), 26, decided by Judge Hoffheimer of the Superior Court of Cincinnati is an interesting case. Judge Hoffheimer in that case intimates that the rule which he states might be different in the case of patentees; but the case of *Bauer & Cie v. O'Donnell*, *supra*, was not decided at that time. The only rights which a patentee has in the manufacture and sale of the articles covered by his patent which are different from the rights of other manu-

facturers and sellers are derived from the patent law. If immunity be not found in the terms of the patent law, then he is amenable to the provisions of the anti-trust law, and can no more enforce such a contract than can any other vendor.

In the case of *Bauer & Cie v. O'Donnell*, *supra*, Justice Harlan in distinguishing the case of *Conolly v. Union Sewer Pipe Company* from the case at bar, says at page 260:

"The present case is plainly distinguishable from the Conolly case. In that case the defendant who sought to avoid payment for the goods purchased by him under contract had no connection with the general business or operation of the alleged illegal corporation that sold the goods. He had nothing whatever to do with the formation of that corporation, and could not participate in the profits of its business. His contract was to take certain goods at an agreed price, nothing more, and was not in itself illegal, nor a part of, nor in execution of any general plan or scheme that the law condemns. * * * The case before us is an entirely different one. The Continental Wall Paper Company seeks in legal effect the aid of the court to enforce a contract for the sale and purchase of goods, which it is admitted by the demurrer was in fact and was intended by the parties to be based upon agreements that were and are essential parts of an illegal scheme."

Neither the Supreme Court of the United States nor the Supreme Court of Ohio ever decided that a patentee had a right by virtue of his patent to enter into a contract of this character. On the contrary, the Supreme Court of this state in the early case of *Jordan v. The Overseers of Dayton*, 4 Ohio, 295, decided, as did the Supreme Court of the United States, that the sole object and purpose of the patent law was to enable a patentee to prevent others from using his patented article without his consent, but that his own right of using the patented article was not enlarged by the patent law. And the court further decided in that case that the right of a patentee to the use of his patent was subservient to the paramount claims and interests of society at large, just as the right of any other owner in and to the use of his property is subservient to such paramount rights of the public. That decision has never been overruled in Ohio; but on the

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contrary the same doctrine has been since substantially announced in the cases of *State v. Telephone Co.*, 36 O. S., 311, and *Todd v. Wick*, 36 Ohio, 370, the court in the latter case saying that "the right of property in a patented invention or discovery and a right of property in any other article or thing which is the subject of ownership are the same."

The anti-trust law of this state had been on the statute books for many years before this contract was entered into, and by the terms of that statute such contracts were declared to be unlawful in this state, against public policy and void.

For the reasons stated, I have reached the conclusion that the court can not lend its aid to the enforcement of this contract. As is said in *Wall Paper Co. v. Voight & Sons*, *supra*:

"The court can not lend its aid in any way to a party seeking to realize the fruits of an illegal contract; and while this may at times result in relieving a purchaser from paying for what he has had, public policy demands that the court deny its aid to carry out illegal contracts, without regard to individual interests or knowledge of the parties."

An entry may be drawn in accordance with this finding and judgment.

**GIST OF AN ACTION FOR RECOVERY OF SECRET PROFITS
FROM A PROMOTER.**

Common Pleas Court of Ashland County.

THE MARBLEHEAD BANK COMPANY V. S. A. RARIDON.

Decided, January Term, 1915.

Corporations—Action Against a Promoter for Recovery of Secret Profits—Not Based on Fraud, but Breach of Duty, and is Barred by the Statute of Limitations.

1. Where a promoter of a bank, in the purchase and sale of furniture and fixtures to the corporation promoted, fails to reveal the secret profits made by him in such transaction, the cause of the action

accrues on the date of the consummation of the sale to the corporation, and is barred in four years under the provisions of Section 11224, General Code.

2. Where, in such case, an action is brought by the corporation against the promoter to recover said secret profits, the ground or gist of the action is not fraud, although fraud be averred in the petition, nor "relief on the ground of fraud" within the meaning of Section 11224, pt. 3, General Code, but the ground or gist of the action in such a case is breach of duty; nor is the statute tolled by the failure to discover the wrong within the said four year period.
3. In such case, the plaintiff corporation will not be permitted to plead the fraudulent issuing of stock to the promoter and the fraudulent taking of credit in the plaintiff bank by such promoter, for the bank is bound to know, through its officers and directors, what stock is issued and what credit given, and therefore the plaintiff bank in such case is estopped to plead ignorance of such issue of stock and such taking of credit in order to toll the statute and preserve its cause of action.

Mykrantz & Patterson, for plaintiff.

C. H. Workman, for defendant.

Wood, J.

This cause is submitted on a demurrer of the defendant to the amended petition of the plaintiff.

Plaintiff avers that the defendant and one W. C. Pollock were the promoters of the plaintiff company "the Marblehead Bank Co." and that while so engaged in the promotion of said bank and while the same was under the control and management of defendant, he caused to be issued a credit deposit slip on May 10, 1907, in favor of himself for a checking account, and that at the time of the organization of said bank defendant caused a certificate of stock for ten shares to be issued to himself of the par value of \$1,000, without paying for the same, but in satisfaction of the expense of the furniture and fixtures he purchased for the bank, which he fraudulently represented to be of the value of \$2,982.32.

Plaintiff also avers that the bank furniture and fixtures so purchased by defendant were not of the value of more than

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\$1,000, and that it had no knowledge of the fact that the defendant had taken a credit deposit slip of \$1,988.32 for expenses, furniture and fixtures until 1910, and had no knowledge of the value of the furniture and fixtures until 1910; that the certificate for the ten shares of stock was issued without their knowledge, and that the same was never paid for; but do not aver when they first had knowledge of the issuing of the stock certificate.

To the amended petition defendant files a demurrer as follows:

"1. Said petition does not state facts sufficient to constitute a cause of action against the defendant.

"2. The cause of action is barred by the statute of limitations, or the action was not brought within the time limited for the commencement of such actions."

Does the amended petition state a case in fraud or relief on the ground of fraud? The cause of action, if any, is a breach of duty on the part of the defendant who was one of the promoters of plaintiff company, to reveal secret profits in the purchase and sale of the furniture and fixtures to plaintiff company.

The liability of promoters for secret profits made by them in transactions between them and a corporation is not based on the theory of fraudulent intent on their part, but grows out of the relation to the corporation and the duty they owe such corporation and persons with whom they are dealing. They are clearly liable, even in the absence of fraud, in the mere failure to make full disclosures of their position and purposes. Their liability is fixed and the right to recovery established when it is made to appear that such secret profits were obtained by them without the knowledge and consent of the corporation or its members.

The promoter is under an affirmative duty either to disclose his relation to his associates or to forego any benefits which he might derive from his position. He is required to account to the company for all profits actually made in relation to the

business which is being transacted, and it is immaterial whether his actions are fraudulent or not, he would still be required to account to the plaintiff in this case regardless of his intention. *Thompson on Corporations*, Vol. 1, 2d Edition, page 117.

The averments of the amended petition which are taken as true under the demurrer would bind the defendant to the plaintiff for any profits he made in the purchase and sale of said furniture.

Independent of any fraud which may have been practiced by the defendant on the plaintiff we think plaintiff has stated a good cause of action, unless the same is barred by the statute of limitations. The first ground of the demurrer to the petition is therefore overruled.

2. This is an action at law. Independent of any fraud pleaded by plaintiff we think it has stated a cause of action when it avers that defendant was a promoter of said company and charged plaintiff the sum of \$2,982.32. for furniture and fixtures, and that the same were not of the value to exceed \$1,000.

It is a well settled principle that whatever profits a person standing in a fiduciary capacity, as did the defendant Raridon, received in transactions with his principal, he would be bound to account for the same and an action would lie to recover the amount.

The gist of this action is not "relief on the ground of fraud" but the recovery of secret profits. It may be true that there was fraud in the transaction between plaintiff and defendant, but the court does not consider that the fraud so practiced is the cause of action or the gist of the action which would entitle the plaintiff to relief, but that the plaintiff is entitled to relief eliminating all fraud.

The term most commonly used "action for relief on the ground of fraud" is confined to actions the immediate and primary object of which is to obtain relief from fraud, and does not embrace actions which fall within some other class even though questions of fraud may arise incidentally. The fraud must be

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an essential part of the plaintiff's right of action and to such an extent that his cause must fail in the absence of proof of fraud.

In this action we think the plaintiff would be entitled to recovery independent of any fraud practiced by defendant. This action was not brought to rescind a contract induced by fraudulent representations, or to set aside a conveyance on the grounds that it was the result of a scheme to defraud, nor does plaintiff's right to maintain this action depend upon his ability to prove that any actual fraud was committed or contemplated.

"A corporation which has been organized to take property from the promoter at a fraudulent profit, and which in fact does so, has a right of action at law to recover such profits from the promoter, which is barred by the six-year statute of limitations, and is not entitled to rely on the provision of the statute which postpones the running of time in suits for fraud cognizable in equity until discovery of the preparation of the fraud.

"The running of the statute of limitations against a right of action by a corporation to recover fraudulent profits made by its promoters, is not prevented by the fact that they are in control of the corporation so as to prevent anyone from obtaining knowledge of the facts." *Pietsch v. Milbrath*, L. R. A., Vol. 68, page 945.

Prior to the amendment of Section 11224 of the General Code of paragraph two an action for the recovery of personal property or for taking, detaining or injuring it was barred in four years, and the fact that the taking was under circumstances constituting a larceny and that defendant concealed his guilt from the plaintiff did not prevent the running of the statute.

"The action in said case is not brought 'for relief on the grounds of fraud' within the meaning of the last clause of Section 15, of the code. The cause of the action is not fraud, but the taking of the property in respect to which as constituting a cause of action the intent is immaterial." *Hawk v. Minnic*, 19 O. S., 462.

"A fraudulent concealment by which the plaintiff has been delayed will not enlarge the time for bringing an action under the statute of limitations." *Fee v. Fee*, 10 O., 470.

If our view of this case is correct that plaintiff's cause of action is not for relief on the ground of fraud, but to recover the secret profits of the promoter, then plaintiff's cause of action would be barred by the statute.

But if the court is mistaken in the conclusion reached and this is an action for relief on the grounds of fraud, how then stands the plaintiff in this action?

This action would be based on the fraudulent issuing of the stock to the defendant, Raridon, and he fraudulently taking credit for the \$1,988.32 on the books of said bank. These were facts which the plaintiff was bound to know through its officers and directors, as it was their duty and they were bound to know what stock was issued as well what credits were given the defendant upon their bank books, and there could be no concealment from the directors on the part of the defendant after the stock had been issued and the credits taken for said amount.

To hold otherwise would be saying that the directors were derelict in their duty as officers of plaintiff company, which will not be presumed in the absence of proof to the contrary. We think the plaintiff was bound to know the transactions which appear upon the bank books and they can not plead ignorance of the same at this time in order to toll the statute and preserve their cause of action.

Holding the above views the court is of the opinion that plaintiff's cause of action is barred by the statute of limitations, and that the demurrer of the defendant should be sustained.

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MUNICIPAL JUDGES NOT STATE OFFICERS.

Common Pleas Court of Montgomery County.

STATE OF OHIO, ON THE RELATION OF CHILTON D. THOMPSON, v.
HUGH WALL, AS DIRECTOR OF FINANCE AND AS CITY
ACCOUNTANT OF THE CITY OF DAYTON, AND
CHARLES HERBIG, AS CITY TREASURER OF
THE CITY OF DAYTON.*

Decided, February 15, 1914.

*Municipal Corporations—Council May be Given Power to Fix the Salary
of a Municipal Court Judge—An Ordinance Awaiting Passage of
the Referendum Period is an Ordinance in Effect, When.*

1. Inasmuch as the judge of a municipal court is a municipal and not a state officer; it is competent for the General Assembly to delegate to council the power to fix his compensation.
2. An ordinance which had been passed in due form by council and signed by the mayor at the time of the taking of effect of the new charter of the city of Dayton, and was only awaiting lapse of the time within which a referendum might be resorted to before going into force and effect, was among the ordinances in force at the time of the taking effect of the charter.

Roy G. Fitzgerald, for relator.

Lee Warren James, contra.

SNEDIKER, J.

This is an action in mandamus. The relator says that he is and has been since the 31st day of December, 1913, a duly elected, qualified and acting judge of the municipal court of the city of Dayton, state of Ohio; that the defendant, Hugh Wall, is the director of finance and city accountant of the said city, and that Charles Herbig is the city treasurer thereof; that the portion of relator's salary as such judge to be paid by the city of Dayton was fixed in accordance with Section 1579-49, of the General Code of Ohio laws, at the sum of \$3,500 per annum, payable in monthly installments out of the treasury of said city, by ordinance passed by the city council on the 15th day of December,

*Affirmed by the Court of Appeals.

1913, and signed by the mayor on the 16th day of December, 1913, and thereafter duly published according to law; that on the 2d day of February, 1914, the relator presented to the defendant, Wall, a voucher for \$291.66, the installment of his salary so payable for the month of January, 1914, and demanded a warrant on the city treasurer for that sum which defendant Wall then and there refused to issue solely for the alleged reason that the act providing for enlarging and extending the jurisdiction of the police court of the city of Dayton and changing the name of such court to the municipal court of Dayton passed by the Ohio Legislature April 17th, 1913, is unconstitutional in so far as it directed the council to fix relator's salary as a local officer of the municipality; that thereupon relator made a demand upon the defendant, city treasurer, for the sum, which was refused; and that there was then and there money and funds in the treasury of the city of Dayton applicable to said salary.

On the prayer of this petition an alternative writ of mandamus was issued by the court.

In answer to the petition the defendants, admitting the election, qualifications, etc., of the plaintiff as a judge of the municipal court of the city of Dayton, Ohio, and admitting their several official capacities, and admitting the passing of the ordinance of December 15th, 1913, fixing the salary of plaintiff, deny that such ordinance was in force and effect at the time of the taking effect of the charter of the city of Dayton; and aver that by provisions of the charter only such ordinances previously enacted as were in force at the time of the taking effect of the charter were continued in force; deny that there was sufficient funds appropriated by the commissioners of the city of Dayton for the payment of said salary, and aver that the enactments of the General Assembly of the state of Ohio creating the municipal court of Dayton was in contravention of Article II, Section 20, and other provisions of the Constitution of the state.

In the argument of the case the following statements were made by counsel:

"Mr. Fitzgerald: And there is another matter of fact I would like to have the record show, that there was actually sufficient money in the treasury of the city of Dayton to pay the amount

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of money demanded; that is, whether it was for this particular judge or not, and that there was enough money appropriated in this particular fund to pay this amount of money to this particular judge, although not for that judge's purpose.

“Mr. James: I think that is the fact.”

It will be observed that the questions here presented are purely of law and not of fact. We are not called upon to determine whether or not the amount of salary fixed by the council by the ordinance of December 15, 1913, is in excess of the amount which should be paid plaintiff. Our determination is to be solely with respect to the constitutionality or the unconstitutionality of the act creating the municipal court, and as to whether or not the ordinance which provided for the payment of salaries to the officers of said court was in force at the time of the enactment of the charter by the city of Dayton, and as to whether the payment should be made if (as it was agreed upon by stipulation of counsel) there is sufficient funds in the treasury of the city of Dayton at this time to pay said salary.

The first, and as we think, the most important issue here presented is as to the constitutionality of the provisions of the act creating the municipal court relative to the fixing of the salaries of the judges thereof. This part of the act is found in Section 4 and reads as follows:

“The salary of the judge of the municipal court shall be not less than one thousand dollars per annum, payable out of the treasury of Montgomery county, in monthly installments, as the county commissioners may prescribe, and such further compensation, not less than two thousand five hundred dollars per annum, payable in monthly installments out of the treasury of the city of Dayton, as the council or other proper legal authority may prescribe. The chief justice, who shall be specially nominated and elected as such, shall receive not less than one thousand dollars per annum, payable out of the treasury of Montgomery county in monthly installments, as the county commissioners may prescribe, and such further compensation, not less than three thousand dollars per annum, payable in monthly installments out of the treasury of the city of Dayton, as the council or other proper legal authority may prescribe.”

As we have said, the contention of counsel for the city is that this is unconstitutional for the reason that such salary should,

under provisions of Article II, Section 20 of the Constitution of the state of Ohio, be fixed and determined by the state Legislature. Counsel for the relator, on the other hand, insist that the section of the Constitution referred to does not apply to the court here established for two reasons: first, because the judges of the municipal court are municipal and not state officers; second, because judges are not such "officers" as are included in the term "officers" as used in Article II, Section 20.

A consideration of the questions thus presented leads us first to inquire how and under what authority the Legislature acted in creating the municipal court of the city of Dayton. Article IV, Section 15, of the Constitution, provides:

"Laws may be passed to increase or diminish the number of judges of the Supreme Court; to increase beyond one or to diminish to one the number of judges of the court of common pleas in any county, and to establish other courts, whenever two-thirds of the members elected to each house shall concur therein; but no such change, addition or diminution shall vacate the office of any judge; and any existing court heretofore created by law shall continue in existence until otherwise provided."

Acting in pursuance of this authority, and particularly that part of this section which provides that laws may be passed to establish other courts whenever two-thirds of the members elected to each house concur therein, the Legislature passed the act creating this municipal court.

The jurisdiction conferred is found at Section 6 of the act which provides that the municipal court shall have the same jurisdiction in criminal matters and prosecutions for misdemeanors or violations of ordinances as heretofore had by the police court of Dayton, and in addition thereto shall have ordinary civil jurisdiction within the limits of said city of Dayton in the following cases:

The section then proceeds to set out the civil jurisdiction of the court which includes jurisdiction given to justices of the peace, and in addition thereto an extended jurisdiction in cases where the amount claimed by the plaintiff does not exceed five hundred dollars.

Without going further into detail as to the exact provisions of of the act with reference to jurisdiction, it is apparent that the

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judges of this court, as such, have both a criminal jurisdiction under the ordinances of the city and laws of the state, and a limited civil jurisdiction.

Does the fact that the jurisdiction is of this dual character make the judge a state officer?

“The primary and fundamental idea of a municipal corporation is an institution to regulate and administer the internal concerns of the inhabitants of a defined locality in matters peculiar to the place incorporated, or at all events not common to the state or people at large; but it is the constant practice of the states in this country to make use of the incorporated instrumentality, or of its officers, to exercise powers, perform duties, and execute functions that are not strictly or properly local or municipal in their nature, but which are, in fact, state powers, exercised by local officers, within defined territorial limits.” *Dillon on Municipal Corporations*, Vol. 1, p. 62.

It was with this in mind that the court passed upon the question presented in 3 Pennewill's Delaware Reports in the case of *State, ex rel, v. Churchman*, at p. 361, where it was determined that the city judge of a municipal court for the city of Wilmington is an officer of a municipal corporation. There the jurisdiction of the city judge of the municipal court for the city of Wilmington was in addition to the sole original jurisdiction in all cases of violations of any of the laws, ordinances, regulations, or Constitution of the city, and criminal jurisdiction for state offenses.

The municipal court of Wilmington was established by authority of Section 1 and Section 15 of Article IV of the Constitution of the state of Delaware which provided that:

“The General Assembly may, with the concurrence of two-thirds, establish courts other than the courts specifically named and prescribed the criminal jurisdiction that might be conferred by the General Assembly upon such inferior courts.”

In determining that the judge of that court was a municipal or local officer and not a state officer, Grubb, J., used the following language:

“Does the fact of a municipal corporate officer being clothed and charged with powers and duties of a public, and not merely

corporate nature, under the provisions of a charter or of a special or general state law, make him the less a corporate officer? The theory and ground upon which every municipal corporation is created is that it is an instrumentality or agency of the state to aid the state in the civil government of that portion of its territory embraced within the prescribed corporate limits. All municipal corporations are emanations of the supreme law making power of the state and created exclusively for the public advantage (*Coyle v. McIntyre*, 7 Houst., 89, 96.) Therefore, in legal contemplation, every such corporation is a public instrumentality or agency created and empowered solely for public purposes and charged with duties in behalf of the state to which it owes its being, and, consequently, as it can act only through its officers, agents and servants, all these are, logically speaking, public or state agencies. And yet they have uniformly been regarded in this state as officers and servants of such municipal corporations and also elsewhere unless there were special constitutional or statutory provisions, or reasons of state policy or policy to the contrary."

And Chief Justice Nicholson in the principal opinion in the case says:

"As Dillon phrases it, 'A municipal corporation proper is created mainly for the interest, advantage and convenience of the locality and its people; a county organization is created almost exclusively with a view to the policy of the state at large. But it is impossible for municipal agencies not to be agents of the state as well. With reference to the police, see the remarks of the court in *Mayor, etc., v. Vandegrift*, 1 Marbel, 18. Its agencies and officers, however, do not on that account cease to be corporate officers and corporation agents, and they can not be considered to lose their character of officers of the corporation by reason of their exercise of powers and their performance of duties other than corporate. If such were the test to be applied to their officers, municipal corporations would be found to possess very few.'"

The language of these two learned judges seems to us to be very applicable to the case at bar, and as we do not find any special constitutional or statutory provisions or reason of state polity to the contrary in this state, our opinion is that as a judge of such court the relator is a municipal and not a state officer.

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The relator being a municipal officer, is the fixing of his salary properly left by the Legislature to council or other local authority in the terms found in this act?

Counsel for the city, as before stated, contend that Article II, Section 20, controls, and that the salary should have been fixed definitely by the Legislature of the state. This section of the Constitution reads as follows:

“The General Assembly, in cases not provided for in this Constitution, shall fix the term of office and the compensation of all officers; but no change therein shall affect the salary of any officer during his existing term, unless the office be abolished.”

What officers are here meant?

In our opinion only such officers as are referred to as are the incumbents of offices created by the Constitution itself. The relator is not such an officer. The court here created by the Legislature is under its fullest control, and the final determination of what compensation shall be paid to an officer of such court may properly be left to the local authorities by the body which has full power to give the court its existence, regulate its jurisdiction, fix its terms, etc.

As said by Judge Brinkerhoff in the case of *State of Ohio, ex rel, v. Francis M. Wright*, 30 Ohio State, p. 334:

“The Constitution has not in terms placed any limit upon the powers of the Legislature over the office and judges of the court established by itself.”

Indeed, that decision goes so far as to determine that a court created, as the municipal court of the city of Dayton was, under the provisions of Article IV, Section 15, of the Constitution, may be abolished and the office of the judges vacated by the Legislature of the state. It can not be intended that the general provisions with reference to the courts specially named in the Constitution shall apply to such a court as is created by the Legislature under provisions of Article IV, Section 15, if this be the authority of the Legislature over the court. For instance, the provision of Section 15 that no changes, additions, or diminutions shall vacate the office of any judge, can not relate to a

court of this character, if the Legislature has the authority, as has been decided by Judge Brinkerhoff, to abolish the court and vacate the office.

The municipal court of the city of Dayton is a creature of the Legislature. Its officers are municipal officers; and we do not find, and it is not our opinion, that this act is unconstitutional, for the reason that in the full authority with which it is vested the Legislature saw fit to leave the fixing of the final amount of the salary, which should be determined on as compensation for the officers of said court, to a local authority which was better qualified to determine as to what that amount should be.

It is also contended by the city, and conceded by the relator, that the ordinance of December 15, 1913, fixing the salary of plaintiff to be paid by the city of Dayton at the sum of \$3,500 per annum, was subject to the provision of the act of April 28, 1913, to the effect, "That any ordinance or other measure passed by the council of any municipal corporation shall be subject to the referendum except as hereinafter provided; no ordinance or other measure shall go into effect after it shall have been filed with the mayor of such municipal corporation, except as hereinafter provided."

The city charter which took effect on the 1st day of January, 1914, among its other provisions, contains the following language:

Section 166. "All ordinances and resolutions in force at the time of taking effect of this charter, not inconsistent with its provisions, shall continue in force until amended or repealed."

And the city claims that by virtue of this provision of the charter of the city of Dayton, the ordinance fixing the salary of relator was not so continued in force. This is not our opinion. We do not believe that either the charter commission which formulated the charter for submission to the people, nor the people themselves, in adopting the charter at the polls, intended that an ordinance which had been passed by the city council, and had been signed by the mayor, and was only waiting the time to go by within which a referendum might be resorted to should be not continued in force by Section 166 of the char-

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ter. We do not know what ordinances were passed at or about the time of the passage of the ordinance of December 15, 1913. Any other view of this question might become very disastrous to other ordinances passed at or about the same time and which were in the same condition on January 1st, 1914, relating to important matters of interest to the city and its people. To say that the commission, or the people, intended that such an ordinance should not continue in force would, in our opinion, be a very unreasonable view.

The only remaining question presented by the pleadings is as to whether or not the salary of the relator for the month of January should be paid, for the reason that no appropriation had been made by the commission of the city of Dayton for the purpose, to the amount which he claims. The stipulation, agreed to by counsel and already referred to, presents a condition which in our opinion makes it the duty of the officers, against whom the writ was issued, to pay relator's salary, notwithstanding no appropriation had been made by the commission for that purpose. If there is sufficient money in the fund to pay relator, the ordinance, passed by the council, having been determined to be valid and in force, his salary should be paid.

Let an entry be drawn in conformity with this finding of the court.

**ILLEGAL AGREEMENT BY RAILWAY AGENTS TO CARE FOR
LIVE STOCK IN TRANSIT.**

Superior Court of Cincinnati.

**JAMES F. BENNETT V. THE PENNSYLVANIA COMPANY AND THE
PITTSBURG, CINCINNATI, CHICAGO & ST. LOUIS
RAILWAY COMPANY.**

Decided, December 10, 1914.

*Railways—Shipment Under Uniform Live Stock Contract—Agreement
to Render Additional Services Void—Action to Recover for Hogs
Suffocated in Transit Through Lack of Care.*

Plaintiff shipped a car load of hogs via defendants' lines between two points within this state under a uniform live stock contract which provided that plaintiff was to care for, feed and water the stock, and unload it at destination, "whether delayed in transit or otherwise." Before arrival at destination the car was delayed, and defendants' employees agreed to care for and water the stock and deliver them for plaintiff. Because of defendants' failure to water and sprinkle them, forty of the hogs were suffocated, and plaintiff sued for their value. *Held*, on demurrer to the petition that as the effect of defendants' agreement was to give to plaintiff a service greater and other than that specified in the contract, it was illegal and void under Sections 510 and 568 of the General Code, and plaintiff could not recover.

Black, Swing & Black. for plaintiff.

Maxwell & Ramsey and *Joseph F. Goldsberry*, contra.

OPPENHEIMER, J.

Plaintiff shipped via defendants' roads a carload of hogs from Clinton, Ohio, to this city, under a "uniform live-stock contract." This contract provided that the shipper should, at his own sole risk and expense, load and take care of, feed and water the stock while being transported, whether delayed in transit or otherwise and unload the same; and that the carrier should not be liable for, or on account of, any injury sustained by the stock by reason of overloading, crowding or suffocating, or by heat, cold or changes in weather. The petition alleges

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that plaintiff accompanied the train which conveyed the hogs to defendant's yards in the outskirts of the city, where they arrived on the morning of September 2, 1913; that defendants were unable or unwilling to transport the hogs to their destination at the Union Stock Yards until after 6 P. M. of that day; that "the plaintiff was ready and willing to remain and to take care of the hogs until their arrival, but that defendants, their agents and employees voluntarily waived all of the provisions of said contract, if any, providing that the plaintiff should remain to take care of said hogs, and agreed to look after them during the day and until their arrival at destination, and to water and sprinkle them when necessary, and to carry and deliver them safely," but that, although the weather was hot and it was necessary and customary to water and sprinkle hogs which were being transported in that manner, defendants' employees failed to water and sprinkle them, as a result of which failure forty of them died. Plaintiff seeks to recover from defendants the sum of \$600, the value of the hogs so lost by him.

To this petition defendants demur upon the ground that the alleged agreement to undertake the care of the hogs on September 2, 1913, until their delivery at their destination, upon which plaintiff relies, is void.

We are of opinion that this position is well taken and that the demurrer must be sustained.

The General Code of this state provides that all railroads doing business within its borders shall file with the Railroad Commission of Ohio schedules showing all rates and charges "for transportation of passengers and property, and any service in connection therewith" (Section 505); "that no railroad shall charge, demand, collect or receive a greater or less compensation for the transportation of passengers or property, or for any service in connection therewith, than is specified" in such schedules (Section 510); and that whoever "knowingly accepts or receives a concession or discrimination in respect to transportation of property * * * whereby any service or advantage is received other than that specified" in such schedule, shall be punished by a fine (Section 568).

We have been unable to find any cases in this state in which these sections of the code are construed, but they are manifestly copied from the Federal Interstate Commerce Act of June 29, 1906, Ch. 3591 (34 Stat. L., 584; Fed Stat. Ann., Supp., 1909, pp. 260 *et seq.*). Accordingly we may look for enlightenment to the federal decisions which have to do with the interpretation of the Interstate Commerce Act. *Railway Co. v. Hirsch*, 204 Fed., 849.

The purpose of the act was clearly to establish reasonable and uniform rates for transportation, to eradicate and prevent every form of discrimination and favoritism, and to place every shipper upon precisely the same level as to the service to be rendered and the charge to be made therefor. The General Assembly did not see fit to permit any exception to this salutary rule, and this court has no authority to create an exception in favor of any person. *Railway Co. v. Kirby*, 225 U. S., 155, 166; *United States v. Railway Co.*, 163 Fed., 114. And the shipper is conclusively presumed to know the contents of the schedules which have been filed in compliance with the provisions of the code, including the nature and extent of the services which the company shall render upon the payment of the prescribed tariffs, and to know that the service contracted for was not permitted by the schedule. *Railway Co. v. Carl*, 227 U. S., 639; *Railway Co. v. Kirby*, *supra*.

At the time when this shipment was made, defendants were prohibited by ordinance from switching the car containing plaintiff's hogs from their own tracks to the Union Stock Yards between the hours of 6 A. M. and 8 P. M. (Codification of Ordinances, Ed., 1911, Section 613). Plaintiff must therefore have known that if the car reached this city between those hours, some delay would necessarily ensue. The contract was intended to provide against such a contingency, for by its terms plaintiff was to "take care of, feed and water said stock while being transported, *whether delayed in transit or otherwise*, and to unload the same." Plaintiff alleges, however, that defendants waived these provisions of the contract, and undertook, in addition to the services which it was required to render in the mat-

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ter of transportation, to take care of, water and sprinkle the hogs while they were still being transported and to unload and deliver them. In other words, this service, which was by contract to be rendered by plaintiff, was voluntarily and gratuitously undertaken by defendants.

That such service was "greater" or "other than" that "specified in the printed schedule" appears to us to be perfectly obvious. If the agreement had been carried out, plaintiff would have received a service which other shippers did not receive, and which defendants were under no contractual obligation to render. The giving of such service is unlawful. *Winn v. Express Co.*, 128 N. W. (Ia.), 663; *Siemonsma v. Railway Co.*, 139 N. W. (Ia.), 1077; *Clegg v. Railway Co.*, 203 Fed., 971.

Plaintiff contends that the waiver in this case was not a discrimination, because the circumstances were peculiar—that the contingency which was found to exist was not within the contemplation of the parties at Clinton. This merely begs the question at issue. As a matter of fact, the possibility of delay was manifestly foreseen, and the contract specifically provided that these services, which defendants are alleged to have undertaken, were to be rendered by plaintiff whether the shipment was delayed in transit or not.

Plaintiff further contends that there can be no discrimination unless two parties are involved; that unless it can be shown that defendants have agreed to render to him services which were denied to others under the same or similar circumstances, no discrimination exists. This view, however, leaves out of consideration the statutory regulation. Not only are defendants forbidden to "give undue or unreasonable preference or advantage to a particular person" (G. C., Section 567), but plaintiff himself is also expressly forbidden to receive *any service other than that specified in the contract* (G. C., Section 568), whether others receive such service or not.

Again plaintiff contends that the additional service, to be unlawful, must be contracted for at the shipping point. This contention finds no support in the statutes to which reference has been made. Nor does it find any support in reason, for if serv-

ices, concessions or rebates might be given at the point of destination or during the transit, provided they were not previously contracted for, the law would be a mere *brutum fulmen*.

Plaintiff finally contends that the discrimination, to be inhibited, must be undue or unreasonable. It is true that Section 567 of the General Code forbids common carriers to "give undue or unreasonable preference or advantage to a particular person * * * in any respect whatever." It is also true that this section forbids *only* such preference or advantage as is unreasonable or undue. *Railroad Commission v. Railway*, 82 O. S., 25. But plaintiff draws an erroneous conclusion from these premises. Railroads may not discriminate between persons who are similarly situated, in the matter of charges made or services rendered in the transportation of themselves or their property. Where distinctions are made, it must be because of some real differences in circumstances or conditions which warrant such distinctions. These distinctions may be embodied in schedules which are filed with the commission in the manner indicated. But these schedules, if they are otherwise proper, prescribe finally the charges which may be made or the services which may be rendered; and the shipper is then forbidden, by Section 568, to receive any services other than those which are thus stipulated.

It remains for us to determine the effect of the illegality of the agreement for the breach of which plaintiff seeks damages. Plaintiff's claim rests, of course, solely upon that agreement. And when plaintiff can not establish his cause of action without relying upon an illegal contract, he can not recover, even though defendants are parties to the violation of the law. *Taenzer v. Railway Co.*, 191 Fed., 543, 550; *Penn v. Borman*, 102 Ill., 523; *Gunter v. Leckey*, 30 Ala., 591; *Railway Co. v. Wilcox*, 99 Va., 394; *Railway Co. v. Brick Co.*, 116 S. W. (Ky.), 1183.

Accordingly the demurrer to the petition must, as we have said, be sustained.

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Campbell v. Bank.

NEGLECT IN DRAWING A DRAFT.

Common Pleas Court of Hamilton County.

AMY R. CAMPBELL v. THE SECOND NATIONAL BANK OF
VINCENNES.*

Decided, April 26, 1913.

Banks and Banking—"Raised" Check Cashed in Good Faith—Negligence Charged in the Manner in Which it was Drawn—Rule of Morality.

Where two rules of law fit a given state of facts evidenced by the findings of a jury, the rule which smacks of morality obtains, unless clearly forbidden by constitutional or statute law.

Charles W. Baker, for plaintiff.*Charles B. Wilby*, for defendant.

DICKSON, J.

The plaintiff claims that she, in good faith, in due course of business, and for a valuable consideration, cashed a forged bank check, one raised from three (\$3) dollars to three hundred and sixty (\$360) dollars; that the defendant, a bank, issued it and was negligent in its making, that because of this negligence she was damaged and asked a verdict for three hundred and sixty dollars and interest. The jury found for the plaintiff in the amount claimed, because as evidenced by its special verdicts, the bank was negligent because it stamped its check with a protectograph, not over five hundred dollars (\$500), instead of not over five dollars (\$5).

Each side asks judgment.

In such an instance do the ordinary rules of negligence apply? If not, what rule does apply?

Negligence implies a fault, a lack of reasonable care. Such a fault to be the cause of an injury, of a loss, must be the

*Affirmed, *Second National Bank v. Campbell*, 21 C.C.(N.S.), —; motion for an order directing the Court of Appeals to certify its record overruled by the Supreme Court February 9, 1915.

proximate cause of that loss, *i. e.*, such a fault as without which the loss would not be. Was the fault, the misuse of the protectograph, the proximate cause? If this mistake had not been made, would there have been this loss to the plaintiff? The jury's expression of this fault excludes by implication other faults, *i. e.*, the defendant was not negligent in the making of the other parts of the check, *i. e.*, if the check had not been skillfully raised the misuse of the protectograph would not have deceived the plaintiff. The bank was not to blame for the skillful raising of the check. Hence the conclusion is irresistible that the misuse of the protectograph was not the proximate cause, and usually a judgment for the defendant would necessarily follow.

But the defendant was not obliged to use the protectograph, a device used to guard against forgery, but it did use it, and used, it became an integral part of the whole check, as much a part, if not more so, as any other part of the check, and the jury has said that the misuse of this device caused the loss.

Law and morality do not always go hand in hand. If morality and the law conflict beyond reconciliation the law will prevail—*vide*—often the statutes of limitation, the statutes of fraud, and the Constitutions and statutes pertaining to crimes. If morality call in question two rules of law, that which smacks of morality will prevail.

If the misuse of the protectograph were not *the* proximate cause of plaintiff's loss, it was a cause, and on the side of morality we have a rule of law, of rank, equal to the rules of negligence—if one of two innocent persons must suffer, that one who put it in the power of another to cause the suffering must lose.

The court will not disturb the verdict because of the evidence.

The motion for a new trial will be overruled, and a judgment for the defendant will be denied, and a judgment for the plaintiff on the verdict will be given.

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Griffitt v. Wetzel.

**STEP-BROTHER HELD TO HAVE BEEN INCLUDED IN A DEVISE
TO "BROTHERS AND SISTERS."**

Common Pleas Court of Franklin County.

BARTON GRIFFITT, EXECUTOR, v. GEORGE WETZEL ET AL.

Decided, January 15, 1915.

Wills—Term "Brothers and Sisters" May Include a Step-brother—Devise to Two Sets of Heirs and to Children of Deceased Heirs Construed to Intend Distribution Per Capita and Not Per Stirpes.

1. A devise to my legal heirs, followed by the statement that by legal heirs the testatrix meant her brothers and sisters, will be deemed to include a half-sister and a step-brother, where it appears that she had but one full sister and no brother but her half-sister and her step-brother had always been called "sister" and "brother" by her.
2. A devise of the proceeds of a certain fund to the legal heirs of the testatrix and of her husband, the child or children of such as are deceased to take the parent's share, without designating as in other items of the will the shares each set of heirs should take, will be construed to mean that the distribution should be *per capita* and not *per stirpes*.

Barton Griffith, for plaintiff.

Raymund & Hedges, Ralph E. Westfall and J. W. Linton, for defendants.

EVANS, J.

This case is submitted on demurrer of plaintiff, and certain of the defendants, to the answer of George Frederick Hilpf.

The demurrer presents for determination by the court questions as to the construction of certain items of the last will and testament of Susanna Wetzel, deceased.

Under items four and five of said will said testatrix directed the payment of certain funds to testatrix's brothers and sisters,

while as a matter of fact said testatrix had no brothers and but one sister, but did have a step-brother, the said George Frederick Hilpf.

Plaintiff is in doubt as to whether by the expression in said will said testatrix intended to include as her brothers said defendant, Hilpf, he being a step-brother of said testatrix.

That under item four of said will plaintiff is uncertain as to whether or not testatrix intended that one-half of the fund mentioned in said item should be paid to the heirs of said testatrix and one-half to the heirs of Karl Wetzel, or whether each heir should receive an equal amount as provided in item five. That is, whether under said item four the legatees take *per capita* or *per stirpes*.

Said Hilpf is a party defendant.

The petition alleges that said Hilpf claims under the terms of said will that he is entitled to share equally with the defendant, Caroline Kessie, who is a sister of the half blood of testatrix.

The court is asked to construe said clause of said will as to are the duties of plaintiff, as executor under said will.

Certain of the defendants, Heinrich Wetzel et al, answer the petition, setting up, among other things, that they are brothers and sisters, and descendants of brothers and sisters of said Karl Wetzel, the husband of said testatrix, and set up their respective claims under said items of said will, which are and do not include said Hilpf as entitled to distribution under said will.

The defendant, George Frederick Hilpf, files his separate answer, and says, in substance, that the deceased testatrix, Susanna Wetzel, was a step-sister of this defendant, and that Caroline Kessie is a half-sister to both Susanna Wetzel and this defendant; that defendant's father, Frederick Hilpf, was a widower with one son, this defendant; that his father intermarried with one Catherine Karr, who at the time was a widow with one child, named Susanna, plaintiff's testatrix; that a child was born of said marriage, who is the defendant, Caroline Kessie; that at the time of said marriage of his father and Caroline Karr this defendant and said Susanna Karr were very young children; that

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at this time this defendant had no recollection of his own mother, nor had Susanna any recollection of her own father; that they were reared as brother and sister, both bearing the same name, that of Hilpf, and neither of them knew that they were not full brother and sister until the defendant was about fifteen years of age, when he was first told that his father's wife was his step-mother, and that Susanna was his step-sister; that thereafter they continued to live together as brother and sister until Susanna's marriage. That said Susanna was all that time known as Susanna Hilpf, and throughout her entire life this defendant was called by testatrix by the name "brother" and testatrix was called by the title of "sister," and that they were known generally among their friends, acquaintances and relatives as sustaining the relation of brother and sister, and that their relationship was as close as if they were such. Said defendant further says that testatrix never had a brother other than this defendant, and no sister other than her half-sister, Caroline Kessie; that by the term "my brothers and sisters," as used in said will she meant this defendant and said Caroline Kessie, and no other person; that testatrix was not educated, and did not speak English accurately, nor distinctly, nor understand the exact meaning and use of English words and phrases; that her attorney who drafted said will, does not speak German, and claims that her intention to make this defendant her heir was for said reasons ill-expressed in her said will. Said defendant claims that by items four and five of said will the said testatrix meant this defendant and said half-sister, Caroline Kessie, and that he is entitled to one-fourth of all the property disposed of by item four of said will, and one-fourth of all the property disposed of in third paragraph of item five of said will, and prays accordingly.

The part of item four of said will necessary to quote, provides:

"I further direct that the proceeds arising therefrom shall be paid by my said executor to my legal heirs, and to the legal heirs of my husband, Karl Wetzel. By legal heirs I mean my

brothers and sisters and the brothers and sisters of my said husband, and the child or children of such as are deceased, such child or children to take the parent's share."

The third paragraph of item five of said will provides:

"Of the remainder of said fund, I direct my executor to pay one-half to my legal heirs, and one-half to the legal heirs of my said husband, and by legal heirs I mean my brothers and sisters and the brothers and sisters of my said husband, and the child or children of such as are deceased, such child or children to take the parent's share."

In the construction of said will the court will look to the will itself, also, the answer of the German heirs, and the answer of said Hilpf. The demurrer is to the answer of said Hilpf, and by the demurrer the demurrants admit as true all the allegations of said answer of defendant, Hilpf, and the demurrer also searches all the pleadings.

From all the above, the court is called upon to ascertain and determine the intention of the testatrix, for her intention must control.

Taking the items of said will here in controversy, the first question for determination is whether said testatrix, by the use of the words "brothers and sisters" therein used by her in classifying her heirs, intended to and did mean her step-brother, the defendant, George Frederick Hilpf.

I am of the opinion, from the reasonable construction of said will itself, and from the facts pleaded in the answer of Hilpf, which facts are admitted by the demurrer, that testatrix meant and intended said step-brother, Hilpf, by the said items of her will.

True she had no brother or brothers of the blood, either by the full or the half blood. Yet, she specifically, in said items, provides and directs said executor to pay "to my legal heirs, and the legal heirs of my husband, Karl Wetzel," the proceeds therein bequeathed. "By my legal heirs, I mean my brothers

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and sisters and the brothers and sisters of my said husband," etc.

That testatrix meant a brother or brothers in some relation by said provision in her will is evident. She had in fact no brother or brothers, of her blood, and never did have such, so she would not have intended to provide for either living or deceased brothers of the blood.

But she did leave surviving her said defendant, a step-brother.

The fact that they were step-brother and sister, and that such relation began at childhood of both; living together with their parents, in the relation of brother and sister, and believing until he was fifteen years old that they were of the blood; bearing the same surname; continuing to live together as brother and sister until Susanna's marriage; and throughout her entire life defendant was called "brother" by testatrix; and she called "sister" by said defendant, and both known among friends, acquaintances and relatives as sustaining the relation of brother and sister.

There is no doubt in my mind that the truth of the facts above stated warrants the conclusion that testatrix intended and meant by said items of her will to include said defendant, her step-brother, as one of her heirs; and that he is the person she meant and intended in the use of the word "brothers" in her said will.

Some authorities are cited by counsel. Those in point, I think, are *Jarman, Wills*, 1637; *Sherman v. Angel*, 1 Bail Eq. (S. C.), 351; *Bowers v. Bowers*, 1 Abb. App. Dec., 214, and other authorities cited in the briefs.

I am of the opinion that under the third paragraph of item five of said will that Caroline Kessie, the half-sister of said testatrix, and the defendant, George Frederick Hilpf, the step-brother of testatrix, are each entitled to the one-fourth part of the proceeds provided for distribution under said item of said will.

I am also of the opinion that defendant, George Frederick Hilpf, is entitled to participate, as the legatee and heir meant and intended in said item four of said will.

There is some difficulty in determining in what proportion they share in said item four, for the reason that in said item of the will the testatrix has not expressed, as she did in item five, the proportionate distribution. What was the intention of the testatrix in that regard? For her intention is what governs.

The intention of the testatrix in this respect now under inquiry must be ascertained from the will itself. She does not provide in item four that one-half of the said proceeds shall be paid to testatrix's heirs, and one-half to her deceased husband's heirs.

But she does provide in item four, "I further direct that the proceeds arising therefrom shall be paid by my said executor to my legal heirs, and to the legal heirs of my husband, Karl Wetzel," etc.

Why did she omit to provide in item four,, as she did provide in item five, that one-half was to be paid to her heirs, and one-half to her husband's heirs?

It can not be assumed that it was omitted by mistake, for in the next item, five, she divided the proceeds, each class to take one-half.

If she had intended that the proceeds in said item four should be paid one-half to each set of heirs, she certainly would have so stated in said item. That she made such provision in item five, tends rather to the conclusion that she did not intend such a division in item four, but did intend by item four that the proceeds therein bequeathed should be paid *per capita* rather than *per stirpes* to the heirs therein designated.

I am of the opinion that said heirs designated in item four were intended by said testatrix, and do, take *per capita*, and not *per stirpes*, and that each of the heirs, the heirs of executrix, and the heirs of Karl Wetzel, share equally in said proceeds for distribution under said item four. No provision in the will is necessary to bind said estate for payment of costs of administration, inheritance taxes, and other taxes, and all such must be paid by said estate before distribution to the heirs and legatees.

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The demurrer of plaintiff, and of defendants joining in said demurrer, to the answer of defendant, George Frederick Hilpf, is overruled.

**ADDITION TO TAX RETURN HELD TO HAVE BEEN
A CLERICAL ERROR.**

Superior Court of Cincinnati.

FOURTH NATIONAL BANK V. WM. A. HOPKINS, TREASURER, ET AL.

Decided, February 2, 1915.

Taxation of National Banks—Addition to Return Enjoined—Evidence Warranting the Conclusion that the Addition Was Due to a Clerical Error.

An increase by the district board of assessors, according to the direction of the state tax commission, of the amount of the return of a national bank, may be enjoined where that increase was evidently the result of a clerical error.

Charles B. Wilby, for plaintiff.

Louis H. Capelle, Assistant Prosecutor, contra.

MERRELL, J.

This action was brought to enjoin the treasurer and auditor from collecting taxes upon the return for taxation of the Fourth National Bank as corrected and amended by the state tax commission, and to compel the defendants to receive payment of taxes as upon the return of the bank before correction. The petition contains numerous allegations which need not be specially referred to. The substance of the plaintiff's claim is that the addition made by the state tax commission of \$25,000 was the product of a clerical error. It was upon this theory alone that

the temporary restraining order was issued, and upon this theory alone that the case has now been heard and finally submitted.

The addition made by the state tax commission to the return of the bank was in the sum of \$25,000 to be added to the item of real estate as given in the 1914 return of the Fourth National Bank.

The form of return required of banking corporations requires a statement of the "true or actual" value of the real estate "as carried on books of company." In the 1913 return of the plaintiff bank the "true or actual" value of the real estate is given as \$500,000. In the 1914 return the "true or actual" value is given as \$450,000. In the returns both for 1913 and 1914 the value of the real estate as carried on the books of the company is given as \$475,000. In the returns of the bank both for 1913 and 1914 under the schedule of "resources" the real estate is returned for \$475,000. The tax value of the real estate as shown by the tax duplicate was in both years \$409,380. At the hearing of this case it was claimed in behalf of the bank that the statement that the "true or actual" value of the real estate was \$500,000 was made inadvertently. However, this may be, in the year 1913 the tax commission, upon noticing this statement of the "true or actual" value promptly raised the return of the real estate made by the bank in the sum of \$475,000 to conform with this admission of the bank's officer of a true value of \$500,000. It is the testimony of the president of the bank at the present hearing that in 1913 an effort was made on the part of the bank to convince the state tax commission of the alleged error in fixing for taxation the value of the real estate at \$500,000. This effort in the fall of 1913 was not persevered in on the part of the bank, so it is claimed, for the reason that the bank's officials were content to submit to the mistake for one year trusting to correct it in the next. At this point it may be remarked that the action of the state tax commission in 1913 was eminently proper as that action consisted merely in bringing the value of the real estate as reported for taxation up to the figure which the sworn statement of the bank, apparently at

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least, admitted to be the true value. This being the situation until the 1914 return was presented to the taxation officials, the attention of the latter was naturally and properly directed to the large discrepancy disclosed in the statement of "true or actual value" as between the 1913 and 1914 returns. This discrepancy as has been pointed out, amounted to the sum of \$50,000. Apparently the state tax commission refused to accept the idea of a depreciation in real estate of \$50,000 and apparently again, it was the intention of the taxing officials to refuse to credit a depreciation of more than half that amount, or \$25,000. The state board accordingly ordered the district assessors to add \$25,000 to the item of real estate valuation, and the district assessors accordingly amended the bank's return, not in the item of "true or actual value" of real estate, but in the value given by the bank as the basis for taxation. The addition of \$25,000 to the "true or actual value" in the 1914 return would have brought that item up to \$475,000, and the actual addition made, that is, to the value returned for purposes of taxation, increased the item in question from \$475,000 to \$500,000. The issue between the Fourth National Bank and the taxing authorities was the subject of interviews between counsel representing the bank and the district assessors and this issue was also discussed in certain correspondence in evidence between the representative of the bank and the state tax commission.

It is in evidence in behalf of the bank, that neither the bank nor any official representing it had been given notice of the proposed increase nor of the fixing of a time and place for hearing as provided by Section 5617-2, General Code, and it may be that the failure of the commission to give such notice, if failure there was, would invalidate the commission's amendment of the return. However, it also appears that notice of the completion of tax lists was published by district assessors as provided by Section 21 of the so-called Warnes law, and it may equally be that the bank is estopped, by its own failure to examine such tax lists, to complain of the figures. These questions I do not go into as the determination of the issue is placed upon other grounds.

Recurring to the correspondence already referred to, we find in the letter of the state tax commission addressed to the district board of assessors of Hamilton county, under date of December 15, 1914, the following:

"Upon investigation the commission finds that the \$25,000 addition to real estate is the same as was made in 1913. In the 1914 report the true and actual value of the real estate is given as \$450,000 and the value of the same property is given in 1913 as \$500,000. The commission did not believe the real estate depreciated \$50,000 in one year, hence the addition was made."

The foregoing statement of the position of the state tax commission, viewed in the light of the oral testimony in the case, leads almost inevitably to the conclusion that the valuation of the real estate for 1914, as finally fixed by the commission, was not a result of an opinion or judgment or the exercise of discretion as to the proper valuation of the property for taxation purposes. The implication of fact is strong that the taxing authorities did not *directly* fix the value of the real estate, or attempt or intend so to do. What the commission did in fact do was to refuse to credit or receive a return for taxation reciting a depreciation in real estate of \$50,000. In this latter action the commission exercised proper, and doubtless sound, judgment, which the court is powerless to disturb. However, due doubtless to the pressure of business and a consequent inability to co-ordinate completely the work of the state commission and that of the district assessors, the latter added the sum of \$25,000 to the bank's return of real estate as given for the purposes of taxation, instead of to the bank's return of "true or actual value" as was apparently the intent of the state commission. In this view of the evidence in the case the addition as actually made is the result of a clerical error, accomplishing, if uncorrected, substantial injustice.

It may be suggested that the taxing authorities are not interested primarily in the return made of the "true or actual value" inasmuch as this is not the basis of taxation. Such a suggestion, however, would be refuted by the facts in the pres-

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ent case which disclose that in 1913 a statement by the bank of "true or actual value," possibly erroneous, was made the foundation by the commission for the fixing of taxable value. Correspondingly, then, in 1914 the commission was properly interested in a genuine statement of "true or actual value" lest a mis-statement uncorrected should become the basis of a future claim on the part of the bank for unjustly reducing the taxable value.

It was manifestly incompetent at this hearing to receive testimony as to the true value in the market sense of the plaintiff's real estate properties. Enough evidence, however, was admitted to indicate that the trend of values in the locality in question was rather downward than upward. This evidence had no place in the case other than as going to the good faith of the plaintiff. In no sense is this evidence the basis of this decision.

Furthermore, it should be perfectly clear that this court entertains no misconception as to its power to revise the judgment of the taxing authorities as to the values of any property whatsoever. The court has no such power. As indicated, however, the evidence is sufficiently clear and convincing to warrant the conclusion that the addition to the return of the Fourth National Bank was, in the way the addition was made, the result of a clerical error and within the jurisdiction of this court.

The temporary restraining order will therefore be made perpetual.

**PROPER METHOD OF COMPUTING THE
FRANCHISE TAX.**

Common Pleas Court of Franklin County.

STATE OF OHIO V. THE CABIN CREEK CONSOLIDATED COAL CO.

Decided, November, 1914.

*Foreign Corporations—Determination of Amount of Franchise Tax
to be Paid by—Where the Company Owns Property and Transacts
Business Outside of Ohio.*

The franchise tax chargeable against a corporation for the privilege of exercising its franchise in this state is to be determined by ascertaining the relation which the property of the company located in this state and the amount of business done here bears to the authorized capital stock as compared to the value of the property owned and the amount of business done outside of the state.

T. S. Hogan, Attorney-General, for plaintiff.

G. E. Trump, contra.

KINKEAD, J.

This action is brought to recover franchise tax against the defendant for the privilege of exercising its franchise in this state, claimed to be assessable under Section 5503, General Code. Plaintiff alleges that defendant is a corporation for profit organized under the laws of West Virginia; that it is engaged in doing business in this state and owns and uses a part of its capital in this state.

The answer discloses that defendant's report filed with the Tax Commission of Ohio shows its authorized capital stock to be \$1,500,000; that the amount of business transacted in the state during the preceding year was \$138,762.28, while the value of all property owned and used by the company in the state was \$300. The amount of business transacted outside of Ohio was \$737,074.58, and the value of the property owned and used by the company outside of Ohio was \$2,470,400.

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It is claimed by defendant that the proportion of the authorized capital stock represented by the property owned and used and business transacted in this state is \$62,330, upon which the tax payable under Section 5503 would be three-twentieths of one per cent. of that sum, and amounts to \$93.50.

The answer complains that the tax commission does not take into consideration the value of the property owned outside this state; that it fixed the proportion of the capital stock to be taxed in Ohio entirely and solely upon the basis of the proportion of the business done in Ohio to the total business of the company. It is urged that the commission had no evidence before it impeaching the report, taking no cognizance of the property outside the state, finding the proportion of the capital stock to be taxed to be \$237,650, fixing the tax at three-twentieths of one per cent.. or \$365.48.

The reply avers that the tax commission fixed the tax in accordance with a rule uniformly followed and applied by it as follows:

“The ultimate object of inquiry is the degree to which corporate franchises are being exercised in Ohio as based upon the total authorized capital stock as a measure of the value of the franchise as an entity. The commission looks to the purpose of the corporation in the exercise of its franchise in this state as indicated by its report. If such purpose is in the main the ownership and use of property in this state, the proportion is determined upon the basis of property owned and used in this state as compared with property owned and used in this state and elsewhere; if that purpose is, in the main, the transaction of business in this state, the proportion is fixed on the basis of business transacted in this state as compared with business of a similar nature transacted in this state and elsewhere; if the purpose consists both of the ownership of property and the transaction of business in this state the proportion is determined upon the basis of property owned and used and business transacted in this state combined, as compared with property owned and used and business transacted in this state and elsewhere combined.”

It is then claimed by plaintiff that the report filed by defendant showed that its exercise of its franchise in this state was, in

the main, for the purpose of doing business in this state. The commission applied the above rule and fixed the tax accordingly,

The question presented by the demurrer to the reply is whether the tax as it has been assessed by the rule adopted by the commission is properly and legally done. That it is not, seems clear from the plain intent and purpose of the statutes applicable. The annual fee charged foreign corporations under Sections 5499-5503 is for the privilege of exercising the franchise of the class or kind contemplated by statute.

There is no doubt that the law imposes the annual fee upon "the continued value of the existing privilege or franchise" (66 O. S., 578) granted to foreign corporations which are "organized for profit and owning or using a part or all of its (their) capital or plant in this state." For the purpose of imposing this tax only upon such corporations, they are required to make a report (Section 5499) which must contain: "The value of the *property owned and used* by the company in this state where situated, and the value of the property owned and used outside of this state and where situated."

The tax commission is required to assess the tax only upon such class of foreign corporations upon the report, and any other facts coming to its knowledge, upon "the proportion of the authorized capital stock of the company represented by its property and business in this state." Section 5502.

The Auditor of State is required to charge for collection an annual fee upon a foreign corporation, in addition to the initial fees, for the privilege of exercising its franchise, based "upon the proportion of the authorized capital stock of the corporation represented by the property owned and used and business transacted in this state." Section 5503.

The several statutes disclose a clear, definite purpose to charge a fee based upon "property owned and used and business" done in this state. The tax assessed is according to the proportion of the capital stock as it is represented by *both its property and business*.

The proportion of the capital stock employed in this state can be determined by mathematical demonstration based on the per-

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centage of property owned and used and business done here, as compared with property owned and used and business done outside of the state.

The statute plainly prescribes the factors to be taken into consideration, furnishes the means of obtaining the data, and leaves no possible opportunity for the exercise of any discretion by the taxing body.

There is no warrant for the method fixed by the rule adopted and followed by the commission. Of course the statutes look to the purpose in the exercise of the franchise of the corporation. It will be conceded too that if the report shows, by the ownership and use of property and business done in the state, that the greater proportion of the authorized capital stock is employed in Ohio, naturally the purpose in the main would be the ownership and use of the property in Ohio.

Where, as in this case, a very small part of the property of a corporation, as office furniture amounting to but \$300 in value, is in Ohio, and \$138,762.28 worth of business is done in this state, while the property outside the state is \$2,470,400 and the business done elsewhere amounts to \$737,074.58, the proportion of the capital to be assessed is to be computed according to the relation which the property and amount of business done in this state, bears to the authorized capital stock as compared with the value of the property and amount of business done outside of Ohio.

The commission is an administrative body, being required to determine the tax "upon the proportion of the authorized capital stock of the corporation represented by the property owned and used and business transacted in this state" (Section 5503). Its function is to follow the letter of the statute and make the mathematical computation according to the intent thereof.

By so doing the amount of tax to be assessed under the statutes may be worked out with mathematical precision as follows:

Value of property in West Virginia	\$2,470,400.00	
Business done outside of Ohio....	737,074.58	\$3,207,474.58
Value of property in Ohio.....	\$ 300.00	

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Business done in Ohio	138,752.28	139,052.28
Total property and total amount of business transacted		\$3,346,526.86

Percentage of this total as represented by the business done in Ohio, .04155.

Applying this to the authorized capital stock of the company \$1,500,000, gives \$62,225, as the proportion of the authorized capital stock represented by business done in Ohio.

One per cent. of \$62,225 is \$622.25.

Three-twentieths of this one per cent. equals \$93.337.

An assessment of \$365.48 on the basis contemplated by law, would represent a business in Ohio of 16.25 per cent. of the authorized capital stock and would necessitate an actual business done and property owned in Ohio of \$543,790.61.

This is conclusive that the tax commission's basis of reasoning is arbitrary and not in compliance with the provisions of the statute. In other words an assessment of \$365.48 is, instead of three-twentieths of one per cent., approximately twelve-twentieths of one per cent.

For the reasons stated the demurrer to the reply is sustained and judgment may be entered upon the pleadings in favor of defendant in accordance with the conclusions herein contained.

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**EVIDENCE TAKEN BY GRAND JURY AFTER RETURN
OF INDICTMENT.**

Common Pleas Court of Van Wert County.

STATE OF OHIO V. RALPH HOOVER.*

Decided, March 1, 1913.

Discretion of Grand Jury—Only Limited Control Over that Body Vested in the Court—Hearing of Further Testimony After Return of Indictment Not Irregular—Motion to Compel Disclosure of Evidence so Taken Does Not Lie.

The taking of further testimony by a grand jury with reference to an offense which has been made the subject of an indictment, but under which no issue has yet been made, is a matter which is wholly within the discretion of that body, and, though unusual, such action is not irregular, and a motion does not lie to require that the defendant be furnished with a copy of the evidence so taken.

Clark Good, Prosecuting Attorney, and *H. L. Conn*, for the state.

Blachly & Kerns and *Dailey & Hoke*, contra.

MATTHIAS, J.

Decision on motion for an order for copy of evidence taken before grand jury.

On February 1st, 1913, the grand jury of this county found and returned an indictment charging Ralph Hoover with murder in the first degree, in the killing of Helen Hoover, by shooting her with a pistol.

On the 5th day of February, the same grand jury being in session, further evidence was heard by the grand jury from several witnesses brought before it by subpoena, who testified concerning said alleged crime, and also gave testimony relative

*Convicted of murder in second degree. Affirmed by Court of Appeals and Supreme Court, without opinion, 90 Ohio State.

to Ralph Hoover in connection with the investigation of the shooting of Helen Hoover.

Having presented this state of facts counsel for the defendant, Ralph Hoover, seek an order from court directing Clark Good, as prosecuting attorney, and John Trippy, as official court stenographer, to furnish the defendant a copy of all evidence, statements and testimony so taken since the finding of said indictment, referring either directly or indirectly to the offense charged and averments made in said indictment. The motion asking for such order was filed after a demand for such transcript had been duly made upon, and refused by said prosecuting attorney and court stenographer.

There is no connection, and there is no longer room for contention, that one charged by indictment with the commission of crime is entitled to a transcript of the evidence taken before the grand jury prior to the finding of the indictment, and on which the indictment was found against him. However, that too had long been a mooted question in this state until it was conclusively settled by our Supreme Court in the case of *State of Ohio v. Rhoads*, 81 O. S., 397, Judge Price delivering the opinion.

But it is urged that the rule there laid down does not apply to the situation here presented, for the reason that the action of the grand jury, in taking evidence relative to the same matter after the indictment in this case was found and returned, was improper and irregular; that it was in effect the taking of depositions without an opportunity afforded the defendant to be present.

It, therefore, being conceded that the court could not properly make or enforce the order now sought unless the action of the grand jury complained of was irregular, it becomes necessary to consider and determine whether the grand jury has any right or authority to take evidence relating to an offense after an indictment has been returned charging a person with the commission of that offense, particularly if the offense charged be murder in the first degree, which, in its terms, includes all the lesser crimes which are based upon wrongful assault. This question has not heretofore been raised or pre-

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sented to any court, so far as counsel in this case or the court have been able to ascertain, and there has not heretofore been any opportunity to present the question to the court in this case. We think it could not have been done by motion to quash or plea in abatement, because those pleas are necessarily based upon the indictment and the proceedings prior thereto. In considering and deciding this question, it is understood, of course, that we are determining the question as one of law upon the undisputed facts presented, and in any suggestion made or illustrations used we shall have no reference whatever to this particular case, but are only dealing with the principle involved therein.

In order to determine whether the action complained of was irregular, let us observe the statutes so far as they affect the organization and action of the grand jury. The law of the state quite clearly indicates the duties that are imposed upon the court and required to be discharged in connection with the impaneling of the grand jury, and instructing them relative to their duties, and the obligation of secrecy imposed by the law. That grand jurors bear an official relation to the court all agree, but to what extent they are under the control of the court authorities are not in accord. In fact, as said by *Edwards on Grand Juries*, none have expressed a well defined opinion as to how far the authority of the court over the grand jurors extends, or to what extent they are independent of the court. However, the weight of authority is to the effect that the limit of control over the grand jury by the court is to enforce orderly procedure by the jurors, protect their session against outside influences, and lend its process in procuring the attendance of witnesses and the production of books and papers before them. There are instances of the assertion of such power and control to the extent we have indicated, but we know of none that extend further than that. During this week, in the common pleas court at Cincinnati, a grand juror was excused from the panel, rather he was discharged by the court, because of the fact that he had taken, and caused to be transcribed, notes of the testimony heard before the grand jury, and a new grand juror was substituted.

This, we think, is illustrative of the manner of, and the extent to which the court has control of the grand jury.

It is provided by statute that "the grand jurors after being sworn shall be charged as to their duty by the judge, who shall call their attention particularly to the obligations of secrecy which their oaths impose, and explain to them the law applicable to such matters as may be brought before them." It then becomes the duty of the grand jury, "to inquire of, and present, all offenses committed within the county." The prosecuting attorney "shall be allowed at all times to appear before the grand jury for the purpose of giving information relative to a matter cognizable by it or advise upon a legal matter when required." He may interrogate witnesses, but it is not proper for him "to remain in the room with the jury while the jurors are expressing their views or giving their votes on the matter before them." It is further provided that, upon the request of the prosecuting attorney, the official stenographer of the county shall take shorthand notes of the testimony and furnish a transcript thereof to him, but to no other person, and also shall withdraw from the jury room before the jurors begin to express their views or give their votes on the matter before them. It is further provided that "when required by the grand jury or the prosecuting attorney, the clerk of the court in which such jury was impaneled, shall issue subpoenas and other process to any county to bring witnesses to testify before such jury." When an indictment is found, twelve of the grand jurors having concurred therein, such finding is indicated by an endorsement upon the indictment as required and subscribed by the foreman.

"Indictments found by a grand jury shall be presented by the foreman to the court and filed with the clerk thereof."

This, in brief, is the law of the state relative to the procedure of the grand jury. It will be observed that power is conferred upon the grand jury to require the clerk of court to issue subpoenas for witnesses to testify before it, and it may do that regardless of the wish or desire, the acquiescence or the opposition of the prosecuting attorney. The prosecuting attorney

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may give information to the grand jury and it is his duty to do so and also advise upon any legal matter when required by the grand jury, but the duty of making inquiry and investigation, and the entire power of taking action thereon, is vested in the grand jury.

Attention has been directed to these provisions of law for the purpose of showing that it is the function of the grand jury, and the grand jury alone, to conduct investigation of matters which may be given it in charge or may come to its knowledge. It is the province of the prosecuting attorney to direct such investigation and he may interrogate witnesses, but the grand jury determines the action to be taken, and it is not permitted that the prosecuting attorney may be present during the expression of views or taking of votes. A great deal of power is thus conferred upon the grand jury. It is a body drawn from the people of the county, and it is subject to direction and control only to a limited extent as heretofore indicated. While the grand jury is in session it is not the province of the court to direct the grand jury that certain witnesses should be called, nor that certain evidence should be heard, nor that any certain action ought to be taken in any particular case that comes before them. It is clear that as to matters within their personal knowledge they act according to their own discretion, and the court should not attempt to control their findings.

In the case of *State v. Will*, decided by the Supreme Court of Iowa, the decision being found in 65 N. W., 1010, it is held that an indictment will be set aside on proof that it was found under express direction of court that such indictment should be returned against the defendant. We have had occasion heretofore to apply this decision, and we call attention particularly to the reasoning of the court. It was held that the trial court invaded the province of the grand jury, and that the discretion and judgment wisely vested by law in that body was swept away by the positive direction of the judge, and that the will of one man was substituted for, and in place of, the judgment of the grand jury.

Now, if the court has not the power to direct the specific action that shall be taken in a particular case, then surely

the court has no authority to restrain the grand jury from an investigation of a matter that is properly before them, so long as, in their judgment, there is need for such further investigation.

Nor is it within the province of counsel, or of the court, upon the facts as they have been presented upon this motion, to inquire into the motive of the grand jury, nor investigate the purpose of the grand jury in hearing this further evidence after the indictment was returned. That was a matter wholly within the discretion of the grand jury, and there is nothing to indicate that that discretion was abused. Such proceeding was in no sense irregular, although it was unusual.

It is urged that upon the presentation of such an indictment no further action could have been taken by the grand jury, and that it is not the duty or province of the grand jury to gather evidence for the state and that such further action amounted only to the taking of depositions in the absence of the defendant.

At the time of the hearing of the evidence complained of, no issue had been made upon the indictment returned, and no appearance of the defendant to plead to the indictment, nor had any pleading been filed at that time raising any question as to the validity of the indictment or the proceedings prior to its return.

Was the grand jury without authority to act after such an indictment was returned? We have said we are considering this question in the abstract, and our discussion is merely of the principle involved, and not necessarily having reference to this particular case. Under the facts stated there may have been several reasons for a further investigation. It may be that evidence was suggested which indicated that there should be a further investigation to determine whether there was premeditation, or deliberate malice, and, consequently, whether the indictment to which the defendant should be required to answer should be one for a lesser crime than murder in the first degree. It may have appeared to the grand jury that there was an accessory or accomplice in the commission of the alleged crime, and that further witnesses should be called and investigation made

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on that account. It may be that some evidence had been discovered indicating the commission of a crime entirely separate and distinct from that charged in the indictment, and not embraced within its terms; it may be that the question had arisen as to whether the manner of killing and the means used were properly stated, and whether different or other and additional means or methods should have been stated, and possibly an indictment with more than one count returned. We merely suggest these as some of the reasons that might influence a grand jury, and properly so, to make further investigation even after an indictment is returned, such as was found in this case. The presumption of the regularity of the proceedings of the grand jury still obtains.

For the reasons heretofore stated it is not the province of counsel, or even the court, upon the facts before us, to question or inquire into the purpose or the motives which move the grand jury.

It is not deemed necessary, or expedient to consider the supposed case suggested by counsel and determine to what extent and for what length of time such inquiry might proceed. It is sufficient to state, as heretofore suggested, that at the time complained of no issue of any nature had been made upon this indictment.

Now if we assume that this proceeding was irregular and void, it is a nullity in every sense, and the court could not properly take cognizance of it for any purpose or take any action predicated upon it.

The argument that such testimony is in the nature of depositions is the same argument that was made in the Rhoads case, as is also the argument that fairness would require an order that this evidence be turned over to counsel for the defense.

This evidence is in no sense a deposition and can not be used as a deposition. It is argued that the defendant should be in at least as good position in this respect as a party in a civil action, but is he not? Suppose notice were not given to take depositions in a civil case, but a witness appeared before a notary public and was questioned, and gave evidence which

was taken by the attorney of the party calling him. There would be no authority for any such proceeding, but there would be no way in which the defendant could require plaintiff's counsel to surrender that evidence nor to file it in court. On the other hand, it could not be used by plaintiff's counsel as a deposition. So that the situation in the supposed case is just as we have it here.

It is suggested that prejudice results to the defendant if he be not delivered a copy of this evidence. Prejudice presupposes a loss, injury, damage or detriment of some sort, but what has the defendant lost? What injury, damage or detriment has he suffered by reason of that procedure? Has he not gained? His counsel have the benefit of the list of witnesses who testified, and to that extent it is pointed out who may be called as witnesses in court, and thus the proceeding complained of has tended to his benefit rather than his detriment or disadvantage. The defendant can not be required to disclose in advance any of his evidence nor the names of witnesses he expects to call, nor even the nature of the defense to be made by him.

It is urged that by the procedure complained of the state may find what witness not to call as well as what witnesses should be called. Undoubtedly that is true, and that occurs every day in the trial of civil as well as criminal cases. Subpoenas are issued and persons brought in as witnesses who, upon interview, it is discovered can not profitably be used by the person calling them, and they are discharged. As above suggested the defense has the benefit of the advance information that certain witnesses may be called by the state, and the opportunity of interview is thus afforded prior to the time of trial.

Counsel concede that the defense is not entitled to the evidence upon which the indictment was found, but insist that it is entitled to the evidence upon which the indictment was not found.

The statute requires that the official stenographer, "at the request of the prosecuting attorney, shall take shorthand notes of the testimony" before the grand jury "and furnish a transcript thereof to him, and to no other person," and there is no ex-

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press or implied authority conferred upon the court to require the official stenographer to do that which the statute clearly and expressly prohibits. The prosecuting attorney has these notes in lieu of memoranda of evidence kept by himself, and he can no more properly be required to surrender the transcript furnished him exclusively, in the manner provided by law, than he could to hand over the memoranda from his vest pocket.

It is argued, as we have suggested, that the defendant should be put upon equality with the state. That is the precise argument that was made in the Rhoads case and was disposed of in the decision by Judge Price in language concise and clear:

“Neither the rules of courtesy nor supposed equitable consideration should be allowed to subvert the practice sanctioned by long experience. The state can not compel the prisoner at the bar to submit his private papers or memoranda to the state for use or even examination, for he can not be required to testify in the case, nor to furnish evidence against himself. Then why should the accused be allowed to rummage through the private papers of the prosecuting attorney? Neither the sublime teachings of the Golden Rule, to which we have been referred, nor the supposed sense of fair play, can be so perverted as to sanction the demands allowed in this case.”

The motion is overruled.

**INJURY TO ABUTTING PROPERTY FROM MAKING A FILL ON A
RAILWAY RIGHT-OF-WAY ACROSS A STREET.**

Common Pleas Court of Franklin County.

SOPHIA OFFENBACHER V. CITY OF COLUMBUS, OHIO, AND THE
PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS
RAILWAY COMPANY.

Decided, November, 1914.

Actions in Equity and at Law—Concurrent Jurisdiction—Election Between Remedies—Pleading—Adoption by Reference Permissible Only When Appropriate.

1. Concurrent jurisdiction, as applied to courts of law and courts of equity with respect to the affording of relief against a wrong in the form of a nuisance, means that under ordinary circumstances when the injury may be adequately compensated in damages the remedy is at law, but when the injury is irreparable in the equitable sense the remedy is in equity.
2. That injury may be irreparable, and warranting intervention by injunction, it must be so great as to be incapable of compensation in damages. If the injury be doubtful, eventual or contingent, equity will not enjoin. Mere diminution in the value of property without irreparable mischief will not furnish foundation for equitable relief.
3. Where a plaintiff alleges facts which constitute a nuisance causing injury to his property in a specified amount, and in a second cause of action alleged that the injury will be continuing and irreparable damage will result to his property unless an injunction is granted, the matter contained in the said second cause of action must be regarded as a conclusion of law which the court will disregard and eliminate *sua sponte*, leaving the plaintiff in the position of electing to sue at law for damages for the alleged injury and nuisance.

George D. Jones, for plaintiff.

E. L. Weinland, contra.

KINKEAD, J.

The plaintiffs petition is as follows:

The plaintiff, Sophia Offenbacher, for her fourth amended petition herein, by leave of the court, says the defendant, the

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city of Columbus, Ohio, is a municipal corporation duly organized and constituted under the laws of Ohio; that the defendant, the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, is a corporation organized and constituted under the laws of Pennsylvania and having a principal office and place of business and being actually engaged in business as a common carrier within said county.

The plaintiff further says she is now and for many years has been the owner and in possession of the following described premises in the city of Columbus in said county and state, to-wit: being 30 feet in width and 99 feet in length off of lot No. 93 in the town of Franklinton (now a part of the city of Columbus), described as follows:

Beginning 30 feet from the southeast corner of said inlot No. 93 running thence north 99 feet to a point; thence running west 30 feet to a point; thence running south 99 feet to a point; thence running east 30 feet to the place of beginning and 30 feet from the southwest corner of said lot 93 as said premises are described in deed book No. 348, p. 326, in the office of the recorder of said county; that plaintiff's said premises lie within 30 feet of the point in which is known as Green street, a long established public street and thoroughfare of said city extending north and south, is crossed at right angles by the right-of-way used and occupied by the defendant railway, which said street, prior to the date hereinafter named, had an established grade; that plaintiff's said premises are bounded on the north by the said right-of-way which runs in and through said city from east to west; that said defendant railway company does now and for many years heretofore, has continuously used, occupied and maintained said right-of-way, as a highway, for the purpose of operating its railway system, as a common carrier for hire, in and through said city; that said defendant railway company, each day, operates many trains of freight and passenger cars and many locomotives on its tracks, on said right-of-way, which is about one hundred feet in width; that long prior to the date hereinafter set forth plaintiff built and constructed and has ever since used and occupied as a place of residence on

said lot a permanent two-story dwelling-house and other buildings in connection therewith; that on or about the — day of —, 1910, the defendants proceeded to fill and did fill with earth, gravel and stone and other permanent materials, the said Green street from the east to the west boundary line thereof and entirely over and across said right-of-way to a uniform height of 14 feet more or less above said established grade off of said Green street; that said Green street was and is thereby entirely closed at that point against public use and travel, and that at the same time, incidentally thereto, the defendants filled up said right-of-way of the defendant railway company, as aforesaid, to the height aforesaid, for a long distance to the east and west of said Green street and plaintiff's said premises; that prior to the making of said fill in said Green street and on and across said right-of-way, said defendant railway company used and operated its cars and locomotives or tracks in conformity to the said established grade of Green street; that prior to the making of said fill in said Green street and in said right-of-way of said defendant railway company, the natural fall of water on said right-of-way, for a long distance east and west of plaintiff's premises, was properly carried away by the drains provided therefor and did not run off of said right-of-way onto and upon plaintiff's said premises, but that subsequently to the making of said fill and by reason thereof said water runs onto plaintiff's said premises and said Green street in large quantities, and after heavy rains and especially during the wet season of the year, fills the cellar under plaintiff's said dwelling-house with water, inundates plaintiff's said premises and said Green street, and there being no means of carrying away said water provided by the defendants, the same remains on plaintiff's said premises and said Green street for a long period of time and said premises are thereby rendered constantly wet, uncomfortable, unsanitary and inconvenient for use and occupancy as a place of residence, and said buildings and improvements thereon seriously and permanently injured and damaged, to-wit, in the sum of \$1,200, for which the defendants refuse to render or pay plaintiff any compensation.

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For a second cause of action herein the plaintiff says she re-avers and adopts herein as part of this cause of action, the same as if herein expressly written, each and all of the facts and averments set forth in the foregoing cause of action, and further says that by reason of the facts aforesaid the said condition in the use, occupancy and obstruction of said right-of-way and of said Green street by said fill by the defendants is and will be continuing if not enjoined and prevented by the order and decree of this court; that the plaintiff has no adequate remedy at law for the injury and damage thereby inflicted upon her and her said premises and that the said injury and damage is irreparable and this plaintiff is entitled to the equitable interference of this court to enjoin and abate the further continuance of said condition of use, occupation and obstruction of said right-of-way and said Green street.

Wherefore the plaintiff prays judgment against the defendants for the sum of \$1,200 damages, and for an injunction against the defendants preventing them from further maintaining and continuing said fill in said right-of-way and said Green street and from causing water to be thrown off of the said right-of-way onto and upon said Green street and plaintiff's said premises, and that upon the final hearing of the case a mandatory order may be made by the court requiring the defendants to remove said fill and to restore said Green street, and said right-of-way to the condition prior to said — day of ———, 1910, when said fill was made therein, and for all other proper relief in law and equity to which the plaintiff is entitled.

A demurrer to the petition for want of facts is filed by the railway company.

A demurrer is filed by the city of Columbus for misjoinder of parties, improper joinder of causes, separate causes of action against several defendants are improperly joined, and for want of facts.

From the earliest period it has been a settled principle that courts of equity have concurrent jurisdiction with courts of law in case of private nuisances. The doctrine of the English courts was that the jurisdiction in equity was not original, but

consisted in the exercise of the extraordinary power in equity in aid of a legal right of property in order to preserve and protect it from injury pending the trial of the right or after such right had been first established.

This strict rule of formal procedure was gradually relaxed and departed from until by universal acquiescence it became the practice for courts of equity to entertain jurisdiction to decide and dispose of the entire litigation. So it came to be a settled rule that a court of chancery had concurrent jurisdiction with courts of law, by injunction, equally clear and well established in cases of private nuisance. The basis for the remedy by injunction in such cases was that the right should be clear, and the injury must be such as from its nature is not susceptible of being adequately compensated for by damages, or such as from its long continuance, may occasion a constantly recurring grievance, which can not be prevented otherwise than by injunction. The interference by equity must be on the ground of sustaining irreparable mischief, or of suppressing multiplicity of suits. *Holsman v. Bleaching Co.*, 14 N. J. Eq., 335; *Carlisle v. Cooper*, 21 N. J. Eq., 576; *Finch v. Resbridger*, 2 Vern., 390; *Burnham v. Kempton*, 44 N. H., 79; *Miller v. Edison, etc., Co.*, 80 N. Y. Supp., 319.

Concurrent jurisdiction in some connections means "acting in conjunction" (*In re Mattson*, 69 Fed., 535). "Concurrent" is having the same authority, that is each of two courts, or of law and equity, have authority to deal with or exercise jurisdiction and power concerning a subject-matter as a nuisance. See *Rogers v. Bonnett*, 37 Pac., 1078, 1079 (2 Okla., 553); 141 Ill., 491; 72 Wis., 62; 7 Am. St., 837.

The use of the term concurrent jurisdiction in connection with the power of a court of law or a court of equity over the wrong of nuisance means that under ordinary circumstances when the injury may be adequately compensated in damages the remedy is at law. But when the injury is irreparable in the equitable sense the remedy is in equity.

A party having two such concurrent rights is said to have a right to elect which one he will pursue. That is, wherever an

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injury is within the concurrent jurisdiction of law or equity, the rule is that the injured may elect to pursue the one remedy or the other at his choice.

It seems incongruous to say that a party may elect to sue at law or in equity at choice, in a case where it must appear that his injury is irreparable in order to come within the jurisdiction or power of equity. But such right of election clearly exists in such cases, the theory being that in a case where the two remedies do exist the party may elect to pursue the less effective remedy if he so chooses.

In this case plaintiff has elected to state certain facts which she complains constitutes a private nuisance, injuring her property to the extent of \$2,000, for which she claims damages. This is an action at law.

Plaintiff further undertakes to set up a second cause of action in which it apparently is sought to set forth an alleged cause of action.

Adoption by reference is permissible when appropriate. But it is improper in this case. The allegation that the injury is "continuing if not enjoined and prevented by the order and decree of this court; that the plaintiff has no adequate remedy at law for the injury and damage thereby inflicted upon her and her said premises, and that the said injury and damage is irreparable and this plaintiff is entitled to the equitable interference of this court to enjoin and abate the further continuance of said condition of use, occupation and obstruction of said right-of-way and Green street," in its entirety is a mere conclusion of law, and not the statement of any fact or facts. It is to be entirely disregarded in considering the demurrer. The court *sua sponte* orders all that part of the petition beginning with the words "Second Cause of Action" down to the prayer of the petition to be stricken out as improper and irrelevant.

With this portion of the petition eliminated it leaves the plaintiff in the apparent position of electing to sue at law for damages for the alleged nuisance and injury to her property.

Plaintiff places the measure of the injury to her property at the specific sum of \$1,200.

Irreparable injury, to lay the foundation for intervention by injunction, must be so great as to be incapable of compensation in damages. There must be injury and damage. If the injury be doubtful, eventual or contingent, equity will not enjoin. Mere diminution in the value of property without irreparable mischief will not furnish foundation for equitable relief (*Rhodes v. Dunbar*, 57 Pa. St., 274). The "diminution of the value of the premises is not a ground" for injunction. *Fishmonger's Co. v. East India Co.*, 1 Dick., 164 (Lord Hardwicke); *Attorney-General v. Nichols*, 16 Ves., 337.

There was a recognized right in a party litigant at common law to demand both legal and equitable relief; that is he could pray for damages and an abatement of a nuisance, and also for an injunction, against its continuance, the action being technically known as an assize of nuisance. It was part of the judgment that the nuisance be abated. 3 Black, Com., 220; *Wagoner v. Jermin*e, 3 Den., 306.

The same relief may now be had in an ordinary civil action under the code in a proper case. *Cogswell v. R. R. Co.*, 105 N. Y., 319; *Hudson v. Caryl*, 44 N. Y., 533.

As this case stands, with the matter stricken out it is to be regarded as an action at law, followed only by legal relief.

As the petition stands it states a good cause of action. An order may be drawn covering the *sua sponte* order of the court, an amended petition and new demurrer may be filed and overruled as per this opinion. The demurrer to the fourth amended petition is overruled.

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Whitford v. Stewart.

SCOPE OF EMPLOYMENT OF CHAUFFEURS.

Common Pleas Court of Cuyahoga County.

SARAH E. WHITFORD V. CHARLES J. STEWART.

Decided, July 10, 1914.

Woman Struck by Automobile While Alighting from Street Car—Gross Negligence to Drive Between a Car Discharging Passengers and the Curb—Regardless of the Validity of a Prohibitory Ordinance—Unauthorized Detour of a Mile Does Not Take a Chauffeur Out of the Scope of His Employment, When—Intention of Chauffeur and Extent of the Detour Determining Factors—Tendency to Broaden the Liability of Employers Placing in the Hands of Employees Appliances Capable of Great Injury if Negligently Handled—A Chauffeur Not an Agent But Often in the Class of Domestic Servants.

1. The traffic regulation which in many cities has taken the form of an ordinance, that a vehicle following a street car must stop when the car stops to take on or discharge passengers, has become an established custom which passengers have a right to assume will be observed and which relieves them under ordinary circumstances from the charge of contributory negligence in failing to look back.
2. A chauffeur who drives his machine at the rate of twenty-five miles an hour between the curb and a car which has stopped to discharge passengers, is guilty of negligence so gross and palpable as to be clearly willful.
3. In such a case the question whether the chauffeur bore the relation of servant and was acting within the scope of his employment, is one for the jury to determine from the evidence and surrounding circumstances.
4. A chauffeur who picks up some acquaintances while driving on an errand for his employer, and turns back one mile to take them to their destination, and during this detour strikes and injures a pedestrian, must be held to have been acting within the scope of his employment at the time of the accident.

H. F. Payer, for plaintiff.

Hoyt, Dustin, Kelley, McKeehan & Andrews, contra.

FORAN, J.

On May 13, 1913, the plaintiff in this action filed an amended petition in this court, alleging that about 4 p. m. of June 12, 1912, she was a passenger on an east-bound Payne avenue car

in the city of Cleveland; that the car stopped at the intersection of Payne avenue and East 27th street, both of which highways are public thoroughfares, for the purpose of enabling her to alight therefrom; that she descended from the steps of the car and was proceeding toward the southerly curb of Payne avenue, and had taken but a step or two in that direction, when the defendant, through his servant, one Stephen Pelrein, so recklessly and negligently managed and operated the defendant's automobile, which he was then and there driving, that the same collided with and ran over the plaintiff, causing her severe, painful and permanent injuries. That the automobile was being driven in an easterly direction at the time, and the driver thereof was attempting to pass the street car on the southerly side thereof.

Certain traffic ordinances of the city of Cleveland, which it is claimed this driver disregarded, are pleaded; and the acts of negligence upon which plaintiff relies are specifically set forth.

By reason of the injuries plaintiff claims she sustained, she says she suffered pecuniary loss in the sum of \$10,000.

About the time plaintiff filed this petition, and practically coincident therewith, her husband, Charles W. Whitford, brought an action against the defendant for the loss of the wife's services or consortium, due to the injuries plaintiff claims she sustained, to his damage in the sum of \$1,000.

In his answer defendant admits the plaintiff sustained certain injuries in collision with his automobile on June 12, 1912, as alleged in her petition, but denies she was injured to the extent or in the manner claimed by her, and denies all the other allegations in the plaintiff's petition; and by way of defense says that whatever injuries plaintiff sustained on that occasion, if any, were caused solely and proximately by her want of ordinary care; and that if he was in any respect negligent, the plaintiff's own negligence contributed to any injury she sustained.

A reply was filed, denying the allegations of the answer which are not admissions of the claims set forth in the petition.

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The plaintiff's cause of action was tried to a jury by another branch of this court during the April term, 1913, resulting in a verdict for the plaintiff, which, on motion for a new trial, was set aside and a new trial ordered. Thereupon the parties entered into a written stipulation by which it is provided that a jury be waived, and the case of the plaintiff and that of her husband be tried to the court on a transcript of the evidence and exhibits produced at the previous trial of the plaintiff's case; and if the court should find the defendant liable, judgments aggregating \$5,000 shall be entered against him in full satisfaction of the record. The right to urge objections, motions and exceptions made and taken at the previous trial, and the right to prosecute error, are reserved.

Pursuant to this stipulation, the trial was had during the April term, 1914, the court acting in the dual capacity of trier of the facts and judge of the law.

It is admitted that the defendant owned but was not riding in the automobile at the time the plaintiff claims she was injured, and that one Stephen Pelrein was in his employ as a regular chauffeur.

The record is far from satisfactory. Perhaps from a misconception of the legal principles involved, or the theory adopted by counsel, the case was loosely tried at the former hearing before the court and jury. Counsel for plaintiff evidently brought to the trial of the cause a double theory, a bow with two strings; one to meet and overcome a persistently present obstacle and assert an ever present right, and another to provide for chance possibilities or contingencies that might arise. To this end counsel diligently sought to convey the impression that Pelrein, the defendant's servant, was driving easterly on Payne avenue to meet, pick up or get his master at some point or place in the easterly point of the city. This contention is absolutely groundless, and nowhere in the record is there a scintilla of evidence to sustain it. Two witnesses testified that after the accident, when the plaintiff was in her own home, located a short distance from where the accident occurred, the chauffeur, who was present, said "he was then (at the time of the accident) on his way to

get his boss, Mr. Stewart." Objection to this testimony was overruled by the court, and exception taken. As the statement was merely the narration of a past transaction, the objection should have been sustained.

"The test of liability in all cases depends upon the question whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment and the duties incident to it; and the declarations of the servants are not sufficient to establish such authority." *Wood, Law of Master and Servant*, Section 279; *Lee v. Nelms*, 57 Ga., 253.

If the jury received the impression that the chauffeur, as he drove easterly on Payne avenue, "was then on his way to get his boss," the testimony was extremely prejudicial and should have been excluded. Pelrein was not a witness, and this is to be regretted, as he would undoubtedly have admitted what every one knows to be true—that he, as well as all chauffeurs acting as domestic servants, frequently and continually use their masters' cars for incidental purposes of their own. He would unquestionably have admitted that such deviation as he made just before the plaintiff was injured was such a common occurrence that the master's assent thereto would be fairly inferred and assumed as one of the incidents which every man who employs a chauffeur may be said to reasonably anticipate. Indeed we must admire, if we do not commend, the wisdom and ingenuity of counsel for the defendant in their apparent laches in failing to produce Pelrein as a witness, and in securing the stipulation they did as to what he would say if present as a witness. The stipulation is as follows:

"It is stipulated by counsel for both parties to this action that Stephen Pelrein, if he could be produced by the defendant, would testify substantially as follows: That on the 12th day of June, 1912, he was instructed by his employer, the defendant herein, to call for defendant with defendant's automobile at defendant's office in the Perry-Payne Building at about 4 o'clock P. M. That some little time before that hour in the afternoon of said day he started with his said machine and drove from defendant's residence on Shaker Heights down to Euclid avenue,

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thence west on Euclid avenue to East 9th street, turning north on East 9th street. At the corner of East 9th street and Superior avenue he met Mrs. M. Doreen, and upon learning that she and a witness, Mrs. Brolley, were intending to go east on Payne avenue to a dress-maker's on East 30th street near Payne avenue, he volunteered to take them to the dress-maker's in the machine. That the accident in this case happened while on their way to the dress-maker's as aforesaid."

The distance from the corner of East 9th street and Superior avenue to East 30th street on Payne avenue is just about one mile.

In this connection, the defendant's instructions to his servant are important. He says (p. 73 of the record), when he left the machine in the morning he gave Pelrein positive instructions to be at the Perry-Payne Building at 4 o'clock that afternoon. At the same time, in answer to a question as to instructions given, he said: "Well, you may call them general, because he was *supposed* to be there at 4 o'clock every afternoon." As the record does not disclose any reason why the instructions should be any more specific on that day than on others, it is only fair to presume that the instructions were general as stated. The defendant might well assume the general instructions stood as a positive order, but there is no reason to believe that the instruction was specifically repeated that morning. Asked when he left for home that day, June 12, 1913, he answered, "I would say about 4 o'clock, 4:30," and that he was not conscious he had to wait that day, or at least he did not remember having to wait. If he had, he would no doubt have remembered it.

Two questions arise: First, was the chauffeur, Pelrein, negligent in causing the injuries of which plaintiff complains? Secondly, was he, at the time the injuries were inflicted, in the scope or orbit of his employment, so as to charge the defendant with liability?

To the first question there can be but one answer. The negligence of Pelrein was so palpable and gross as to be clearly wilful; and if the plaintiff had been killed, he could and should have been tried and convicted of manslaughter. Practically all the streets in Cleveland on which street car lines are located are

double-tracked; and as a measure of safety, the door for the entrance and exit of passengers is on the right-hand side of the car as it goes forward, and generally at the rear, so that passengers, in boarding or alighting, do not have to cross street car tracks. All vehicles going in the direction in which a street car is going must, if they pass the street car, go by the car door and through or over the space on which passengers must travel to reach the car in boarding or the sidewalk in alighting. The ordinance pleaded by plaintiff provides, "That the driver of every vehicle shall stop such vehicle and remain at the rear of any street car which has stopped to take on or let off passengers, so as to allow passengers free passage between the street car and the curb; and the driver shall cause his vehicle to remain standing until such car has resumed motion."

Every driver of motor vehicles in this city knows of this traffic regulation and is charged with knowledge of it. If Pelrein had obeyed the regulation, the plaintiff would not have been injured. Counsel for defendant insist this ordinance is unconstitutional and void. We think it is so far as it permits drivers of vehicles to pass standing street cars in congested districts if they clear six feet from the lower step of the car.

In *State v. Born*, 85 O. S., 430, the power or authority of the city of Cleveland to determine what is a congested district is expressly questioned if not denied, the court holding, "The defendant had the right to have that fact (as to whether or not the locality was a congested district) determined generally by the jury upon evidence."

Section 12603, General Code, provides against the operation of motor vehicles on streets at a speed greater than is reasonable or proper, having regard to the width, traffic, use and general rules of such road, or so as to endanger the property, life or limb of any person, etc.

If the last paragraph of the ordinance permitting drivers to pass standing street cars in congested districts, if they clear six feet from the lower step, could be invoked as a defense to negligent drivers under such circumstances, it would clearly contravene the provisions of this section of the statutes, and therefore

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be void and of no effect. We are not called upon, however, to pass upon the validity of this ordinance. The facts do not require it. The regulation has become a traffic custom or rule. Passengers on street cars know of it, and have a right to anticipate that drivers of all vehicles will respect it as such, and can not be charged necessarily with contributory negligence, even if they fail to look to the right when alighting from street cars. The drivers of motor vehicles know, and are charged with knowing, that passengers presume they will stop in the rear of a car that has stopped to let off passengers and ordinary care requires them to act accordingly. The driver of a motor vehicle, seeing a street car ahead of him, stopped, will be presumed to know that women are liable to alight from the car, or liable to step from the sidewalk onto the street to board the car; and that, owing to their skirts of fashion's chance, they can neither mount the platform with a nimble skip or reach the sidewalk with a flying leap.

The plaintiff testified that when the car stopped she looked to the right and left and saw no one and heard no signal; that she had taken but three steps when the automobile was upon her, and she could not get out of the way; and that the driver, Pelrein, said he was going at such a pace that he could not stop. As this admission was made after the accident, it is more than doubtful if it is competent to bind the defendant, but it was not objected to, appears in the record and was not denied.

The conductor of the street car testified that he stopped his car to let plaintiff off; that he was standing on the rear platform of his car at the time, and that he had a clear view to the rear or westward; that he saw the automobile when it was about one hundred feet away, driving in the car tracks and coming at a speed of twenty-five to thirty miles an hour; that when it got to within about forty feet of the car it swerved out to the right-hand side and went past the car; that he saw the driver would not be able to stop the automobile, and he then hollered to the plaintiff, who had taken but two or three steps, and that she threw herself backward and the automobile ran over her foot. He also testified that the doors of the car swung outward eigh-

teen inches, and this prevented the plaintiff from seeing the automobile which, as she alighted, was driving in the same direction in the rear of the car.

It must be admitted that the conductor was a disinterested witness, and with his opportunities of seeing the whole situation, his evidence must be accepted as literally true. He is in no way related to the plaintiff, and, so far as appears, has no possible interest in the outcome of the litigation. The chauffeur, Pelrein, will not be heard to say that he did not see the street car or know that it had stopped when he was over one hundred feet away; for if the operator of a motor or other vehicle fails to see that which is in plain view, in legal contemplation he will be held to have seen it. *McDonald v. Yoder*, 80 Kan., 25; *Spangler v. Markley*, 39 Pa. Sup., 351.

A Mrs. Brolley was the only witness called by the defendant as to the accident. She was one of the ladies riding with Pelrein. She says that before they reached the street car Pelrein turned into the car tracks to pass some team on the street, and "then he tried to drive back into the road, and the street car and the automobile were both together." She says further that plaintiff "stepped out of the street car and dodged back and forth," and the rear wheel of the automobile struck her.

It is difficult to understand how this statement in any way sustains the allegations of the defendant's answer; for if, when Pelrein tried to turn into the road, to the right of the street car, or after he had turned in, both the automobile and the street car were then together, or alongside of each other, the conclusion is inevitable that he remained in the street car tracks until he had practically reached the car, and then turned sharply to the right and swung into the roadway alongside of the street car door as the plaintiff was alighting, a careless and negligent thing to do under the circumstances if the automobile could have been stopped or its speed checked.

The testimony of this witness can not be seriously considered. The conductor, who had a clear view of the whole situation, does not mention the teams in the roadway, and their presence there at the time is more than doubtful. The chauffeur was driving in the car tracks, treking on the rails, because it was smoother

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traveling than on the payment. They may have passed teams farther back or before they reached the street car, and the witness was confused as to the time.

It is quite significant that the other occupant of the automobile, Mrs. Doreen, was not called. It was said she was in a hospital, but no reason is given why her deposition was not secured.

We hold that the negligence of Pelrein was so gross and wilful that, as was remarked by Justice Grier of the Supreme Court of the United States in the case in which we will refer presently, his retention by the defendant furnishes some evidence of negligence on the part of the defendant in the selection and retention of the servant; and this upon the theory that a master is bound to use ordinary care not only in selecting competent servants, but in promptly discharging them if they prove to be incompetent.

The natural instincts of a man are unconsciously manifested in spite of the "curb and rein" of the ego. A naturally careful and prudent man is never reckless; a naturally heedless, reckless man may be careful and prudent sometimes, but he is never so at all times.

The second question to be determined—was Pelrein, at the time he ran over the plaintiff, within or in the scope of his employment?—is not so easily answered. The main difficulty lies in formulating a definition of what is meant by "line of duty" or "scope of employment." It will be admitted that no rule can be laid down that will fit all cases that arise in this relation, and that each case must be decided upon its own facts and circumstances. If by "scope" is meant, as the lexicographers say, the thing in view, that which is aimed at, the end or aim to be kept in view, the ultimate design, aim, purpose or intention, there would seem to be no difficulty in concluding and asserting that the ultimate design and aim, the controlling purpose and intention of Pelrein when he started from the defendant's home on Shaker Heights, was to go to the Perry-Payne Building, and there await the defendant's pleasure to either take him home or to such other place as he might choose to go. This was the thing in view, kept in view, and accomplished as designed.

This was the duty he started out to perform, and he performed it on time, and to the entire satisfaction of the defendant. No complaint is made that he was not at the place directed, and at the time ordered by the defendant. The record does not disclose that the defendant was delayed a second of time or in the slightest degree inconvenienced by anything the servant did on the way from defendant's residence to his office. The claim, however, is, that because the servant, admitting he never lost sight of the main and controlling purpose for which he was put in motion by the defendant's orders, temporarily or momentarily stepped aside or delayed for a purpose of his own, he was not in the scope of his employment while in the accomplishment of that personal purpose. In other words, the contention is, that while a domestic servant is on duty, he must do no act during that time unless an act which is of service and benefit to the master. Some courts have so held, but we believe the overwhelming weight of authority is decidedly against the proposition. Except in a few isolated instances, the tendency of courts has always been to solve doubts against the employer in determining whether the act is within the scope of the servant's employment, to the extent at least of submitting the question as one of fact to the jury (*Johnson v. Chicago, etc., R. R. Co.*, 141 N. W., 430). In cases where the servant acts maliciously and inflicts injury upon third persons, it has been held that the law does not undertake to make any nice distinctions fixing with precision the line that separates the act of the servant from the act of the individual. When there is doubt, it will be resolved against the master, upon the ground that he set in motion the servant who committed the wrong (*Railroad Co. v. Cleveland*, 11 L. R. A. (N. S.), 853; *Fishing Club v. Stewart*, 93 S. W., 598; *Thompson on Negligence*, Sections 544-564). As negligence is often so gross, as in the case before us, that it may be said to be malicious or wilful, there does not seem to be any good reason why this doctrine does not apply to all negligence cases. On the other hand, many courts, mindful of the broad, fundamental proposition that persons should only be held to answer for their own wrong, have endeavored to circumscribe into as narrow limits as is consistent with human rights the doctrine predicated upon the maxim, *qui*

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facit per alium facit per se, holding a master responsible for the wrongful acts of his servant; and as this doctrine is in direct antagonism with the broader doctrine of personal responsibility, some courts have regarded it with much jealousy. But Mr. Wood, Master and Servant, Section 277, pertinently says:

“Servants generally are irresponsible and unable to respond in damages for the injuries inflicted by them in the prosecution of their master’s business; so that it is regarded as no more than just that he who has made it possible for him to injure another should, so far as the injury results from the exercise of powers conferred upon him, be responsible in his stead. * * * While the interests of society on one hand require that the right to act by another should be recognized, yet, upon the other hand, the same interests require that a person who does act by another should, so far as he has entrusted such person with authority to act for him, be responsible for the method and manner in which he exercises the power, thus imposing upon the masters the exercise of proper care and diligence in the selection and retention of their servants. The rule is predicated upon principles of justice, and is sustained by sound public policy.”

It will be noticed that this learned author insists that the master must exercise proper care and diligence, not only in the selection but in the retention of his agents and servants. Third persons who are injured by the negligence of a servant wholly irresponsible can not reasonably be expected to look with favor upon the claims of the master that his servant was not acting within the scope of his employment at the time the injury was inflicted, and with the instrumentalities placed in the hands of the servant by the master. In justice and reason it seems to them that the man who put the force in motion ought to be responsible for the failure to exercise due care in controlling it while in motion. That eminent jurist, Judge Ranney, seemed to have this idea in mind in *Keary v. R. R. Co.*, 3 O. S., 209, where it was said that—

“No one has a right to put in operation forces calculated to endanger life and property without placing them under the control of a competent and ever-active superintending intelligence.”

But we are told that a gasoline touring car in operation is not a force calculated to endanger life and property. Indeed the courts seem to hold that such a vehicle is no more dangerous than a carriage drawn by animal power. Of course this depends upon how it is managed and operated. No one will deny that a reckless and incompetent man is infinitely more dangerous in a touring car than he would be in a carriage drawn by a team of horses. But aside from the mode and manner of use, there are potential possibilities of danger in a large high-power automobile that can not possibly exist in a horse-drawn carriage. The automobile is driven by *vis a tergo* power, and in the nature of things is not as easily controlled in emergencies where automatism contends with "mind stuff." In the hands of the reckless—and it is too often in the hands of the reckless—this gift of the gods becomes a potent ally of the "Grizzly King," this golden car of progress becomes the drab ambulance of destruction. If there be any truth in this judicial statement, then the editors of all the newspapers who daily fill their columns with details and the names of the victims of automobile accidents ought to be enrolled in the National Ananias Club. As a jurist, I acquiesce in the statement that it is as harmless as a horse-driven phaeton, but I remain a Galileo.

In an examination of the authorities bearing upon the meaning of the phrase, "within the scope of employment." two lines of thought are discernible, one giving a circumscribed or strict and the other a broad and liberal construction to the doctrine predicated upon the maxim, *qui facit per alium facit per se*, the great preponderance of weight of authority being in favor of the broad or liberal construction. Much subtlety, refinement of reasoning and caustical hair-splitting distinctions are to be noticed in the opinions of courts and the texts of law writers. For instance, when it is asserted that while deviations from the straight line of duty are immaterial, or that mere mingling by the servant of some purpose of his own with that of the master will not relieve the master of liability, or that the immediate pursuit of the master's business is necessarily subject to usual incidental personal acts, slight delays and deflections, it is answered that these acts lie, so to speak, within the penumbra of

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the authority actually conferred by the master reflected upon the servant casts a shadow of authority, and that the acts of the servant, which it is insisted on the one hand did not relieve the master of liability, really fell within the penumbra of this shadow, and therefore, because of their remoteness from the master's business, do relieve the master of liability. An examination of a number of these authorities may enable us to see our way clearly and reach a definite conclusion upon the facts now before us. Some of the authorities cited by counsel relate to cases of agency, and will not be considered, as there is a distinction between a servant and an agent. A servant is one who serves another; an agent one who acts for another (*Austin on Jurisprudence* [Third Edition], 976; *Northey v. Trevillion*, 18 Times L. R., 648). The authorities seem clearly to hold that there is a distinction between a household or domestic servant and an employee or workman. The household servant not only performs service for the benefit and interest of the master, but also ministers to his pleasure. He is hired to assist in domestic matters, and usually lives within the employer's house or upon his premises, and is regarded as part of the family. He is subject to the master's orders at all times during the day or evening, unless expressly relieved from duty. To a considerable extent, the master stands in the relation of *pater familias* to servants of this class. The employee or workman lives in his own home; his daily hours of labor are definitely fixed, and in this state, except by express contract, at eight hours. During the other sixteen hours of the day his time is absolutely his own; and if, by express agreement, he works overtime, he is paid for the extra labor; but during the period that his time is his own, the master has no control over him; the relation of master and servant has ceased to exist, during this period, as absolutely as if they were strangers. This distinction was early recognized in *Laugher v. Pointer*, 5 B. & C., 553. Littledale, J., remarked:

"For the acts of a man's own domestic servants there is no doubt but the law makes him liable; and if this accident had been occasioned by a coachman who constituted a part of the defendant's family, there would be no doubt of the defendant's liability."

We will have something further to say about the facts of this case.

Counsel for the defendant contend that the doctrine of *respondent superior*, which is really the result or consequence of applying the legal maxim, *qui facit per alium facit per se*, should be limited to those cases where authority to do the act resulting in the injury has actually been conferred upon the servant. *Beven on Negligence in Law*, 573, says: "There is no good reason why this meaning should be so limited."

Shearman & Redfield (6th Edition), Section 147a, after stating the rule as contended for by counsel for the defendant, say:

"There is, however, a line of cases to the effect that slight deviation from the master's service will not defeat his liability. Such indeed seems to be the established rule in the English courts."

Then after stating his opinion of the English rule, the author proceeds:

"It would seem, therefore, that probably all that the commentator is authorized to say is that the rule on this subject is in a state of transition with a tendency to hold slight deviations immaterial. This, too, it must be recognized, is consistent with the generally received doctrine that the mere mingling by the servant of some purpose of his own with that of the master will not relieve the master of liability. One does not cease to be acting in the course of his master's employment because his most direct and immediate pursuit of the master's business is subject to necessary, usual, or incidental personal acts, nor even by slight and immaterial delays or deflections from the most direct route for a personal or private purpose, the pursuit of the master's business continuing to be his controlling purpose. Such acts, not amounting to a turning aside completely from the master's business so as to be inconsistent with its pursuit, are often only what might be reasonably anticipated, to which therefore the master's assent may be fairly assumed; or they are, in many instances, but the mingling with the pursuit of the master's business some purpose of the servant's own. Moreover, it must often be proper to submit the question to a jury upon the issue of materiality, hence it is not to be expected that the decisions will in all cases be harmonious."

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It must of course be admitted that where there is authority to do a thing, where the hand that does it may be the servants, yet the reason of the act is the master's authorization or the master's interest, and therefore the master, as the motive power, is held responsible. But as Beven says, page 574, "the law goes further than this, and where there is authority to do an act, the master's authorization covers all acts, whether implicated in, or subsidiary to, the main action, not those merely which are necessary to effectually do it."

It will be noticed that the commentator (Sherman & Redfield) says the law upon this question is in a state of transition. (Just now mechanical forces and social dynamical conditions are in a state of eruptive transition, and the law must adjust itself to the lightning forward leaps man is making on the highway of material and social progress.) It is a far cry from the ox cart, whose wheels were the sawed-off ends of a log, to the automobile and aeroplane; and great indeed is the gap between the age when the news of disaster or invasion was spread by the Greek runner or the Persian courier and the time when the human voice goes singing like thought along the pulsing wire a thousand miles away, and man throws his expressed thought, his desires and his hopes into etheric vibrations, and instantly plucks them out of the sky at any point on this air-belted globe. Amidst these mighty mutations which throw us into vastly higher-gearred modes of life and being must we, so far as our legal rights are concerned, remain chained to the Promethian rock of precedent and have our vitals gnawed by greed and avarice, because courts seem unwilling to break the fetters of stare decisis rules that were formulated to meet conditions incident to man as he emerged from the mists and shadows of prehistoric times. The world is swinging onward with mighty strides; and while it is the province of courts to prevent the debacle of civilization, yet they should keep in touch with and conform, as nearly as the safety of society will permit, to this forward movement of dynamic forces.

If a master insisted that his chauffeur should not under any circumstances, while out with his car on the master's business,

stop to talk to a friend or use the car to do an errand of his own, or even pick up a friend of the master or of his own and take him to his office, if the friend was going practically in the same general direction the servant's errand or the master's business carried him, he could not retain the services of the chauffeur for any length of time. Every man who keeps a chauffeur knows he does these things. They are acts which, from the nature of the business and by custom and usage, are reasonably to be anticipated by the master, and his assent to them must be fairly assumed; and unless an act of this kind amounts to such a complete abandonment of the master's service that it can be said the pursuit of the master's business ceases to be the controlling purpose and ultimate design of the servant, the master will not be heard to complain, and say that the servant, in doing such acts incidental and consequential to the service was not in the scope of his employment. Servants could not be retained or their services secured if they were denied privileges of this kind, and hence it can be fairly said they are incident and even subsidiary to the service. They are, so to speak, perquisites of the service. A household or domestic servant who lives in the master's house or on his premises must of necessity purchase clothing or other necessary articles personal to himself; he may have to consult a physician, see a dentist or secure the services of a barber, or see a friend on a personal matter, and he may not be relieved from duty until after business hours. These things he must of necessity do during business hours, when he is on errands or business for the master or members of his family with the master's carriage or automobile. Every man who keeps a chauffeur or coachman knows this and impliedly assents to it.

That Pelrein was a domestic or household servant is, indirectly at least, shown by the record. The witness McCahan says he called at the defendant's residence one evening about 6 o'clock, that Pelrein was on the premises near the garage and, as the defendant says, raking grass. McCahan did not leave the defendant's place until some time after 6 o'clock P. M., and Pelrein was still there.

The word chauffeur, as used or applied to a man who drives a private car, is synonymous with coachman. In French, from

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which the word is derived, it means a fireman or stoker. Historically, the word meant a robber who used to burn the feet of his victims to make them surrender their money; hence its application to the taxicab driver seems fictitious.

Counsel for defendant admit that if a servant is driving his master's car, say, in a general westerly direction on the master's business, he may make a slight detour or deviation from the most direct route to the point or place the master's business calls him or requires him to go; but they insist that deviation or detour means a temporary divergence from the straight course and then a trend or inclination toward it, as if one were to travel on the curve and not through the center of an elongated ellipse; and they further insist that if the servant turns back and goes in an opposite direction any distance, this is a complete departure from the scope of his employment and is not a deviation, the contention being that deviation means a slight deflection to the right or left from the straight-forward course or direct line in which a man is traveling. In this we can not agree with counsel, nor do the authorities. Even the ordinary meaning of the word deviation can not be so restricted or limited, but the word as a legal term has a well-defined meaning. It was first so used in marine insurance policies, and deviation was held to occur when in a policy a course was definitely specified and the vessel departed from it, or if a vessel departed from the course usually or customarily followed. If the policy provides for certain named ports of discharge, the vessel must take them in the order in which they appear in the policy. If she goes to the second or third port named in the policy and then turns back in a directly opposite line to the first, there is a deviation.

"Unreasonable or unexcusable *delay* is deviation, whether the *delay* be upon the high seas or in port." *Arnold v. Pacific Mut. Ins. Co.*, 78 N. Y., 716.

"Strictly speaking, a deviation originally meant only a departure from the course of the voyage, but now it is always understood in the sense of a material departure from or change in the risk without just cause." 2 *Parsons on Marine Insurance*, 1, quoted with approval in *Wilkins v. Insurance Co.*, 30 O. S., 341.

A provision in a building contract providing that a "deviation" from the plans should be paid for, it was held that extra work was a deviation (*Dunn v. Stokern*, 3 Atl., 349). Whether deviations, detours or delays by a servant enhance the master's risk depends upon the "mind stuff" of the servant. He might be just as negligent or more so if he did not deviate or delay. Physical and meteorological conditions might affect the risk in vessel deviations. Accompanying the mechanical phenomena of action in prudent normal men, but wholly disconnected from it, we always find the phenomena of alert consciousness which means attention and care, while the lack of such consciousness means want of attention, and negligence; but this want of care may manifest itself at any time or place; but the greatest care can not avoid unknown or uncharted rocks and shoals, or avoid and prevent storms which are governed by fixed physical laws.

When Pelrein started from his master's home on Shaker Heights, a city map in evidence shows he had a choice of three or four routes all leading more or less directly to the Perry-Payne Building. He was not restricted to any of these routes, either of which would have taken him to his destination in practically the same time. If he met with an accident on any route selected, it would be absurd to say he would have avoided it if he had selected or taken a different route, for if the phenomena of alert consciousness did not accompany the phenomena of action, it would make no difference which route he selected. If on any route he selected he stopped five or ten minutes to talk with a friend, and shortly thereafter collided with a truck crossing an intersecting street, it would be sheer nonsense to charge the accident to the delay, for if the delay had been a few seconds greater the truck would have passed through the intersection and the accident would not have happened. So it will be seen a deviation, detour or delay does not necessarily change or enhance the risk. Lack of attention or inability to fix and hold in the mind that watchful observation essential to the successful performance of an act requiring care, means lack or want of active consciousness, and it as much a mental defect as loss of memory. A man naturally deficient in attention is apt to be

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negligent at all times and in all places. This defect being inherent and constitutional, it seems strange the defendant did not observe it in this servant; and while the defendant can not be held liable merely because he retained an incompetent servant in his service, unless the evidence clearly shows that fact, the rule ought not to be strained, under the circumstances, to relieve him from liability. Reckless driving on the streets of a populous city by a man in all respects normal is criminal; and it is no more than charitable to assume that Pelrein was simply negligent because of constitutional defective attention or lack of active consciousness.

Suppose when Pelrein turned north from Euclid avenue on East Ninth street, he had turned east on Superior avenue when he reached that thoroughfare, and drove three or four hundred feet, to leave his measure for a suit of clothes or to buy a pair of shoes, would the defendant be heard to say this was such deviation, if an accident occurred while he was driving east or returning, as to relieve him from liability? If Pelrein could turn back on Superior three or four hundred feet and still be in the pursuit of his master's business and in the line of his duty, the distance he might travel east before it could be said he had abandoned the master's service would be one of degree, and that would be a question to be submitted to the jury.

In addition to the large number of authorities cited by counsel, the court has examined a great many others; and while there is an apparent conflict in the adjudicated cases, a close analysis clearly shows that in most instances the conflict is more apparent than real. In no two cases examined are the facts precisely the same; and as each case is or ought to be decided upon its own facts and circumstances, the application of a general rule, if one could be accurately stated, to the facts and circumstances of every case would be wholly impossible; but running through the labyrinth of sophistry and the bewildering maze of subtle reasoning of practically all of the cases, some general principles are clearly marked and broadly stated; and while their application to divergent and variable facts may seem confusing, yet they are distinguishable and reconcilable.

The authorities examined establish, we believe, the following propositions:

I. The law defining what is meant by "in the line of duty or scope of employment" as used where the relation of master and servant exists, is undergoing transition, the tendency being to enlarge the liability of the master who has placed in the hands of his servant the means or instrumentality by which the injury is occasioned to third persons; and where there is doubt as to whether the relation of master and servant exists, or whether the servant at the time of the injury was in the scope of his employment, the question is one of fact for the jury to determine under the evidence and circumstances surrounding the situation.

II. In cases where the servant obtains or takes possession of the instrumentality, such as the carriage or automobile of the master, without his knowledge or consent or under such circumstances that the master's assent thereto can not be fairly inferred, and uses the same for a purpose wholly his own, in no way connected with the master's business, and at the time of such use is performing no service for the master, the master is not liable for an injury to third persons during the period of such unauthorized or unlawful use by the servant of the master's carriage, automobile or other instrumentality of like or similar character.

III. Where the servant is rightfully in possession of the carriage or automobile of the master, going on an errand or trip of any kind for the master, or returning to the master's home from such trip or after having performed such errand, the mere mingling by the servant of his usual, necessary and customary personal business with that of the master's business will not relieve the master from liability if an injury is sustained, through the negligence of the servant, by a third person while the servant is so using the master's carriage or automobile for such personal purpose; or if, while the servant is so using the instrumentalities of the master, or driving the same, he makes an immaterial deviation or stops to talk to a friend, or takes a friend with him on the way, if the delay be not unreasonable,

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the master is not relieved from responsibility. Such acts for personal ends, such deviations and delays and such use of the master's carriage and automobile are incident to the service and are of such common and frequent occurrence that the master's assent to such use may be fairly presumed, and that such use was within the master's contemplation when the contract of service was made.

IV. Where the deviation, delay or the mingling by the servant of his personal business with that of the master's, occurring where the servant is given possession of the carriage or automobile of the master to be used in his business, the extent and materiality of the deviation, delay or mingling of the servant's personal business with that of the master becomes important in determining whether the servant, at the time, was acting within the scope of his employment, and the courts have uniformly held this was a question of fact to be determined by the jury.

V. Unless the deviation, delay or mingling of the servant's private affairs with the business of the master was manifestly so marked, unreasonable and unusual that it could be fairly said the servant subordinated the master's business to his own, and that his motive and intention, gathered and deduced from his conduct, clearly shows that his own pleasure or purpose was the primary and that of the master the secondary object, aim and design he had in view, in which case it may be a question of law for the court.

VI. While the servant is performing a duty for the master, such as driving the carriage or automobile to some place directed by the master or driving it to the master's home after some duty has been performed, and immaterial deviations or delays occur, the motive and intention of the servant is important in determining whether or not the deviations, delays or other immaterial acts took him out of the orbit of his employment. If his controlling purpose and ultimate aim and design was to accomplish the duty assigned him, within a reasonable time or within the period of time designated by the master, and he did so accomplish or perform the duty, it can not be said as a matter of law that the immaterial deviations, delays or other acts took him out of the orbit of his employment.

VII. If a servant, having possession of his master's automobile or carriage, goes "on a frolic of his own," the frolic meaning of carouse, lark or spree, the master is not liable for injuries inflicted by the servant using his automobile or carriage during such frolic. Such conduct is not incident to the servant's duty or service; it was not in contemplation of the master when the contract of service was made; it is such gross and unreasonable abuse of the master's confidence, it so changes and enhances the master's risk, that, as the rule now exists, it can be said as matter of law the master is released from liability, even if there remained in the muddled mind of the driver a vague and hazy concept of the duty he owed to his master, and a vagrant, indeterminate purpose to perform it some time at his convenience or when the frolic had spent its force and lost its charm. The servant who goes "on a frolic of his own," even if he does not intend to abandon the master's service, puts himself in a position where it may not be possible for him to perform the task assigned him.

That *intention* is a controlling factor in determining whether the servant's act took him out of the scope of his employment, is held in *College Co. v. Lloyd*, 60 O. S., 448, where it is said in the syllabus:

"When the act complained of may or may not be, from its nature, in the course of the servant's employment, and this depends upon the real motive or purpose of the servant in doing the act, it is a question for the jury to determine upon a consideration of all the circumstances adduced in the evidence."

This case is so familiar that only a cursory review of the facts is necessary. The plaintiff was injured by the act of the janitor of the defendant, and there was some evidence that the janitor's act was inspired by ill-will. The plaintiff was called in to repair an electric light, and had his ladder upon a table for that purpose. The janitor was engaged in cleaning out the room and wanted to move this table. He told the plaintiff to get down, and because he did not do so, it is said he became impatient and "violently shoved the table, throwing the plaintiff from the table to the floor and inflicting injury." This act of the jani-

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tor would seem to be a clear departure from his employment, especially so if he availed himself of this opportunity to injure the plaintiff because of ill-will. The court, however, thought that there was no doubt but that the janitor was at the time engaged in the performance of his duty, and that whether he was or was not was a question which should have been submitted to the jury. If the act or motive of the janitor, under these circumstances, can be said to be a question of fact for the jury and not a question of law for the court, how much more strongly can it be urged that it was for the jury to say whether Pelrein intended to abandon his master's service when he turned east on Payne avenue, or whether his intention was to merely accommodate some ladies that he knew, his controlling purpose all the time being to ultimately accomplish the object and aim which he started out to perform, that was to go to the Perry-Payne Building for his master. It was Pelrein's duty to be at the Perry-Payne Building in time to take his master home. This was his ultimate design and object. When he went east on Payne avenue, did he have any purpose or motive to abandon this design or purpose? Certainly not. He told the ladies he had a few moments to spare, that is, that he could drive them to the dress-maker's and still be on time at the Perry-Payne Building to perform the service upon which he was then engaged and which was the main and controlling purpose he had in view and which he ultimately performed.

In *Ritchie v. Walter*, 63 Conn., 155, which is a leading case, it was said by the court in the opinion, at page 161, that the general rule of construction is, that the intent of the party shall prevail.

Counsel for defendant cite many authorities but rely mainly upon *Rawson v. Olds Motor Works*, 20 C.C.(N.S.), 182, affirmed by Supreme Court, June 29, 1914, without opinion. The facts of this case are in no respect similar to those in the case before us. They fall clearly within the scope of propositions 5 and 7 above stated. These facts are as follows: One William Clark was an employee of the Olds Motor Works, working for the defendant. About 6 o'clock p. m. of September 28, 1908, when his

employment for the day had terminated, he was directed by the foreman to take a certain automobile to the dock of the Detroit & Cleveland Navigation Company, a mile away, and ship it to Detroit. This service he could perform in fifteen minutes at the outside. Instead of executing this commission as directed, he proceeded to a restaurant, had his supper, drank beer, and started "on a frolic of his own" by inviting two or three waitresses to go with him on the frolic. The invitation was accepted, and the frolic began by a drive of over three miles on various down-town streets, and ended at 8 p. m. in the death of the plaintiff's decedent, who was run down by Clark while driving defendant's automobile. The trial court, Keeler, J., in granting a motion directing a verdict for the defendant, said (12 N.P. [N.S.], 125):

"The driver had been told by Mr. Booth, of defendant company, to take the automobile direct to the Detroit boat for shipment as soon as he could do so, so as to have it properly tagged and freighted. * * * The driver changed his course not less than nine times in covering a distance of probably three miles. The extent of the deviation or *extra viam* was great, marked and unusual. * * * He was going east on St. Clair avenue at the time of the collision, his destination being Euclid Beach Park, some twelve miles east of the boat landing."

Bearing in mind that Clark's motive and his intention to drive twelve miles east on a frolic of his own is essential to the inquiry before us, this simple statement of facts clearly demonstrates that he had subordinated the master's business to his own pleasure; and while he may have intended to ultimately, if he fell not by the wayside, ship the car to Detroit, that purpose was a secondary and the frolic of his own the primary object and aim he had in view. A simple test will show conclusively that at the time he ran over the decedent he was not in the employment or service of the Olds Motor Works. Suppose he had not killed the decedent or met with any accident, but simply used the car for two hours, or until 8 p. m. for a purpose of his own, could he successfully maintain an action against the Olds Motor Works for two hours extra work? Surely not, for the reason that he was not working or performing service of any

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kind for that company during all of these two hours. The relation of master and servant is reciprocal. There is a promise to perform service and a promise to pay for the service. On the other hand, if a domestic servant uses his master's automobile for a necessary or incidental purpose of his own, or if he delays for ten, fifteen or thirty minutes in executing the master's business, would the master, in a suit by the servant for his salary, be permitted to urge such loss of time as a set-off against the servant's claim? In the Rawson case the relation of master and servant would cease when Clark performed the services he was directed to perform, and this service he could have performed in from fifteen to twenty minutes after he was given the commission. He was directed to take the car directly to the boat as soon as it could be done, and for the extra time in so doing or in taking the automobile to the boat he would be entitled to compensation, but he would not be entitled to compensation of any time that was not necessary to perform that service, and therefore would not be in the service of the master at all. After he had performed the service, which could have been performed, as we have said, in from fifteen to twenty minutes, his time was his own, and he could not charge the master for a second of that time. As soon as the car could be taken to the boat and tagged for shipment, the employment of Clark terminated for that day. If what Clark did could be termed a deviation, it was, as the trial court justly remarked, great, marked and unusual, and he intended it to be much greater, for if he had reached Euclid Beach Park and succeeded in ever reaching the boat before it left for Detroit, he would have traveled over thirty miles. The trip he intended to take was a separate and distinct journey. Turning back on a street for a mile is not in any sense a journey. It would be a misuse of language to so call it.

The Rawson case is typical of a driver going on a frolic of his own, and it ended as such frolics usually do, and the master could not be held responsible under any rule of law, or on any theory except that he entrusted the car to Clark, and thus put in motion the force that did the mischief. This some day, under proper limitations, may be the law, but it is not the law as we

find it. Under the present state of the law, the most we can say or are permitted to say is, that the law as we find it does not make nice or fine distinctions fixing with exact precision the line that separates the act of the servant from the act of the individual; and if there is a doubt, to resolve it against the master for the reason that he set the servant in motion. In the Rawson case there could be no doubt. The departure and intended departure from the line of duty was so great, gross and unreasonable that it amounted to a complete abandonment of duty. No one knows what might have happened if the frolic had proceeded as intended and contemplated. The doctrine of this case has not even a remote bearing upon the facts in the case before us, nor can the doctrine in any possible way be applied to these facts.

There are many exceptions to the general rule, one being, as stated in proposition II, that when the servant departs from the performance of his master's business and wrongfully goes with the master's materials unlawfully taken, and undertakes to do something on his own account, the master ceases to be responsible for the servant's negligence. *Mitchell v. Craswellar*, 13 C B., 237; *Little Miami R. R. Co. v. Wetmore*, 10 O. S., 110.

In *McKenzie v. McLeod*, 10 Bing., 385, decided in 1834, the exception was pushed to its farthest limit, as it was there held that the master was not liable for the negligence of the servant in burning down a house while trying to cleanse a chimney, it being shown that the servant was not told to cleanse the chimney, but to light a fire. To hold at this late day that a tenant would not be liable for the negligent acts of a servant in burning down the house of his landlord would be regarded as a strange doctrine.

Counsel for defendant cite *Kavanaugh v. Dinsmore*, 12 Hun., 465, where it appears that the defendant's servant had delivered merchandise at the office of defendant on Broadway in New York, and had then been directed to take the truck to a stable on Church street and to put it up. In proceeding to carry out this direction of the master he met another servant, and as a personal favor to him drove to another street a mile distant, and

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took a trunk belonging to the other servant to deliver at another place. It was held that as the defendant had not authorized the driver to go to Henry street, the driver was not acting in the business of the master. We know of no reason for the decision, except that the servant was directed to do a specific thing, and in failing to do that specific thing he departed from the line of his duty.

McCarthy v. Timins, 178 Mass., 378, is relied upon by defendants. In this case it was held that the driver of a public carriage is not acting within the scope of his employment when ordered to drive to a stable, his day's work being done, if he turned out of his course and drove some distance in an opposite direction in order to visit a saloon to get a drink, and there left his horses unattended, and they, breaking loose, ran away and injured the plaintiff because the driver had left them unattended. In this case it appears (page 381) that the driver's work was ended for the day. He was then directed to go to the stables, and so long as he had that end in view, and for that purpose and for no purpose of his own, he was engaged in the master's business, even if he made a detour contrary to the direction of his master, but when he went to the saloon for the drink he was on no errand for his master. Hence the court say, "This journey was not for the purpose of getting to the stable even by circuitous route; or, to use the language of Hoar, J., in *Howe v. Newmarch*, 12 Allen, 449, he was doing an act wholly for a purpose of his own, disregarding the object for which he was employed and not intending by his act to execute, and not within the scope of his employment."

It clearly appears in this case that at the time of the accident the defendant's driver was emancipated, that is, defendant's work had been done for that day, and the servant was no longer in his employment, except for the mere purpose of taking the horses to the stable; and as soon as that should be done, he being given a reasonable time in which to do it, he became his own master, and the defendant was in no way responsible to him, he could not be asked to respond to him for any extra time which he may have consumed in unreasonably delaying to perform the service he was distinctly instructed to do.

The case of *Patterson v. Case*, 152 Fed., 481, cited by defendant, is directly in point and is practically the only case cited by counsel for defendant supporting their contention; but the doctrine in this case is in direct contravention to the doctrine laid down in *Philadelphia & Reading Railroad Co. v. Derby*, decided by the Supreme Court of the United States at the December term, 1852. The case will be found in 14 How. or the 55 U. S., 467, and will be referred to hereafter.

Possibly in the *Patterson* case, 152 Fed., 481, *supra*, the fact that the driver of the automobile went into a saloon, where he remained for some time, and then took some friends with him as he drove back over the road which he had taken, may have led the court to believe that there was some evidence that the driver was "on a frolic of his own" at the time plaintiff was injured.

Danforth v. Fisher, 75 N. H., 111, is also cited by the defendant and is an automobile case. It was decided in November, 1908. The chauffeur took his master's car from the place where it was kept and drove to his store to await orders. He was told to get his supper and be at the City Hall with the car at a quarter before seven o'clock. Instead of doing this, after he had eaten his supper he drove the car to Manchester, a mile or two from his boarding house, and in an opposite direction from the hotel, for the purpose of calling upon a friend, the injury to the plaintiff occurring while he was making this call. It will be noticed that in this case there was also a specific direction to do a particular thing, that is, the duty and discretion of the servant were limited.

Northup v. Robinson, 33 R. I., 496, is another case cited by the defendant. It appears in this case that the driver started out, on the morning that the plaintiff was injured, from the defendant's house under directions to go to an express office for his employer. Instead of going to the express office, as he was directed to do, he started to deliver a note for a gardener who was employed on the defendant's premises to the gardener's wife who lived on another road some distance away. The court say (page 497):

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“It appears the chauffeur had a definite errand from the master, namely, to go to the plaintiff’s office, to the express office, and back to the master’s house.”

And that because he departed from this express order, the master was held not liable. Or, in other words, there being a definite and positive instruction given to do a certain definite thing, the servant’s discretion was limited.

The second paragraph of the syllabus, in the case of *Mitchell v. Crasswellar*, 13 C. B., 237, *supra*, which is cited by counsel for defendant, is as follows:

“The defendant’s car man having finished the business of the defendant, returned to their shops in Wellbeck street, with the horse and cart, and obtained a key to the stable, which was close at hand, but instead of going at once and putting up the horse as it was his duty to do, he, without his master’s knowledge or consent, drove a fellow workman to Euston Square, and on his way back ran over and injured the plaintiff and his wife. *Held*: That inasmuch as the car man was not at the time of the accident engaged in the business of his masters, they were not responsible for the consequences of his unauthorized act.”

It will be noticed in this case too that the car man had finished the business of the day, and it was his duty then to return to the stable with the horse. He went to his home, got the keys of the stable, was about to proceed to the stable in an adjoining street when the defendant’s foreman asked him to drive him a part of the way home, which he did. On page 240, the court, in referring to the well-known case of *Joel v. Morrison*, 6 C. & P., 501, where it was held, that if the servant, being on the master’s business, took a detour to call upon a friend, the master will be held responsible, further says:

“If he, the servant, was going out of his way against the master’s implied commands, when driving on his master’s business, he will make his master liable; but if he was going on a frolic of his own, without being out on his master’s business the master will not be liable.”

The court also referred to the case of *Sleath v. Wilson*, 9 C. & P., 607, in which Erskine, J., said:

"I think the law has been most properly laid down by Mr. Baron Parke in the case which has been cited. It is quite clear that if a servant, without his master's knowledge, takes his master's carriage out of the carriage house, and with it does injury, the master is not answerable; and on this ground, that the master has not entrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it."

The master in such case would be liable, and the ground is, that he has put it in the servant's power to mismanage the carriage by entrusting him with it. The court further say:

"No doubt the master may be liable for injury done by his servant's negligence, where the servant, being about his master's business, makes a small deviation, or even where he so exceeds his duty as to justify his master in at once discharging him. But here it can not be denied that, though it was the duty of the car man, on his arrival with the horse and cart at Wellbeck street, merely to take them to the stable, he, in violation of that duty, without the sanction and knowledge of his employers, instead of going to the stable, started on a new journey wholly unconnected with his master's business."

And as bearing upon the case now before us, it was further said by Jervis, C. J., page 245:

"I think, at all events, if the master is liable where the servant has deviated, it must be where the deviation occurs on a journey on which the servant has originally started on his master's business."

I can not understand how counsel for defendant can find in the doctrine of this case warrant for their contention. Maule, J., said he was of the same opinion as Jervis, C. J., and further, on page 240, said:

"That brings us to the real question. The facts were these: The defendant's car man having finished his business, had nothing further to do but drive the horse to the stable. At the time of the accident he was not going a round-about way to the stable, or, as one of the cases expresses it, making a detour. He was not engaged in the business of his employer."

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The reason for the case is, that having finished his business he was no longer in the service of his master. His time was his own; and it could not be said that in doing the act which resulted in the injury he was in the scope of an employment that really did not exist.

The defendant's counsel might have cited *Laugher v. Pointer*, 5 B. & C., 547, where the plaintiff's horse was injured, it appearing the defendant owned the carriage but applied to a job man who supplied him with a pair of job horses and a coachman for the defendant. The coachman, it appears, under some custom, was not paid any salary or wages by the job man, but whatever compensation he received was by way of gratuities from the customer of the job man. It was held that the coachman, so hired by the job man, was not the servant of the defendant, for the reason that he was not hired by the defendant. The defendant had no power to dismiss him, and paid him no wages. The coachman, it is said, "was only to drive the horses of the job man"; he, however, paid him no wages, "and the whole which he got was from the person who hired the horses"; but this was only a gratuity, and because it was optional to give him a gratuity or not, it was held that the driver was not the defendant's servant. This subtlety of reasoning was too refined and attenuated to stand the acid test of legal exegesis, and in *Brady v. Giles*, 1 Moo. & R., 495, "Lord Abinger, C. B., * * * said it had always appeared to him that the Court of King's Bench had pursued an erroneous course in *Laugher v. Pointer*, when they allowed the question now raised to be discussed as if it were a question of law for the judge to decide. It always appeared to him that it was quite impossible to lay down any rule of law on such a point. No satisfactory line could be drawn at which, as a matter of law, the general owner of a carriage, or rather the general employer of a driver, ceased to be responsible and the temporary hirer became so. Each case of this class must depend upon its own circumstances; and the jury, taking the circumstances of the present case into consideration, must undertake the task of deciding."

In a late Ohio case, *White Oak Coal Company v. Rivoux* (15 C.C. [N.S.], 143), it was held that the facts that the automobile

was owned by the defendant and was negligently operated by an employee, does not make a *prima facie* case of negligence against the owner, unless it appears that the employee was driving the automobile with authority, express or implied, of the owner.

In this case it appeared that the bookkeeper or cashier of the defendant used the automobile on the day of the accident on personal business, and that while so using the car the injury to plaintiff occurred. It was claimed by plaintiff in this case that when it appeared that the driver of the automobile was a servant of the defendant, and was driving the defendant's car, a *prima facie* case arose. The Supreme Court held, however, that this was not sufficient, and that, as was held in the syllabus, it must also appear he was driving the automobile with authority, either express or implied, of the owner. The court, in commenting upon the cases cited, uses this significant language:

"We find that in these cases (where) at the time of the accident the automobile was in charge of a servant of the owner—a chauffeur in most instances—whose duty it was to operate the automobile, and he was rightly in possession and use of the same with the consent, and knowledge, and authority of the owner, the courts have held that the establishment of these facts raises the presumption or inference that the person so in charge was acting within the scope of his employment, and then it becomes a question for the jury to determine, upon all of the evidence in the case, whether or not this presumption has been overcome."

Coming now to the cases cited by counsel for plaintiff, we first find the case of *Joel v. Morrison*, 6 C. & P., 501, decided in 1834. The driver was on the master's business, but made a detour to call on a friend. Baron Parke said:

"There is no doubt that the driver of the cart is guilty of negligence, and there is no doubt also that the master, if the person was driving the cart on his master's business, is responsible. * * * If the servant was going out of his way against his master's implied commands when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable."

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We here first meet with the phrase "on a frolic of his own," which has come down through all the cases ever since it was used by this learned judge.

Taking the doctrine of this case, can it be said that Pelrein was not at all on his master's business when he drove back on Payne avenue? It must be conceded that he never ceased to be on that business. It would be straining the law in favor of the master to say that he was not on the master's business; and it can not be said in any view of the case that Pelrein, when he drove back on Payne avenue, was on a frolic of his own, or any kind of a frolic.

We think of the case of *Sleath v. Wilson*, 9 C. & P., 607, states the law distinctly and correctly. In that case the servant had his master's horse and carriage in his possession, and was directed to take them to a certain place, but instead of doing so he went in another direction and delivered a parcel of his own, and ran or drove against an old woman and injured her. The master was held liable for the act of the servant, although at the time he committed the offense he was acting in disregard of his master's orders, for the reason that the master had entrusted the carriage to the control and care of the servant, and in driving it he was acting in the course of his employment. This is perhaps carrying the doctrine further than the courts seem willing to go, and in a later English case the doctrine was somewhat modified. But in the case of *Philadelphia & Reading Railroad Company v. Derby*, *supra*, decided by the Supreme Court of the United States, the doctrine of *Sleath v. Wilson* is approved in these words, page 486:

"The case of *Sleath v. Wilson*, 9 C. & P., 607, states the law in such cases distinctly and correctly."

And Mr. Justice Grier states the facts in the *Sleath v. Wilson* case, and the language used by Mr. Justice Erskine, with approval and adopts the doctrine of the case as the law. Mr. Justice Grier further says (487):

"The entrusting of such a powerful and dangerous engine as a locomotive to one who will not submit to control and render im-

plicit obedience to orders is itself an act of negligence, *causa causans* of the mischief."

In the case just cited the president of one railroad was invited by the officers of another to inspect its road, and at the time of the injury they were riding in a small locomotive. Orders had been given to keep the track clear. One servant of the defendant disobeyed the order, and the collision and injury were the result. This called for the expression of Mr. Justice Grier just quoted.

Counsel for plaintiff relies mostly upon the case of *Ritchie v. Waller*, 63 Conn., 155. This is a leading case, but there is a more and very recent expression relating to an automobile case which is more in point than the cases relied upon by plaintiff. Reference will be made to this case.

In *Ritchie v. Waller*, the servant, while driving his master's cart or wagon, disregarded the instructions of the master. On page 159 the court say:

"Instead of returning to Main street through the lane or Grand or Commercial street, and going thence northerly towards Trumbull as usual, Blackwell drove southerly down the avenue to Bull's Head, and thence into Main street, and thence northerly in the direction of home till he came to a certain shoemaker's shop."

There he got off, leaving the team unhitched, and went into the shop. His purpose and object in so doing was to see the shoemaker about soleing or mending his own shoes. While he was in the shoemaker's shop the team ran away, and injury to the plaintiff resulted. In this case the court holds that the intent of the servant was important, and in the construction of the rule this intent should prevail. On page 161 the court say:

"In by far the greater number of cases where the question of the master's responsibility turns, as in the present case, principally upon the mere extent of deviation by the servant from the strict course of his employment or duty, it has been generally held to be one of fact and not of law. In such cases it is, and must usually remain, a question depending upon the degree

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of deviation and all the attendant circumstances. In cases where the deviation is slight and not unusual, the court may, and often will, as matter of law, determine that the servant was still executing his master's business. So, too, where the deviation is very marked and unusual, the court in like manner may determine that the servant was not on the master's business at all, but on his own. Cases falling between these extremes will be regarded as involving merely a question of fact, to be left to the jury or other trier of such questions."

Practically all of the leading cases decided before that time are commented upon in this case. Mr. Justice Grier, in *Philadelphia & Reading Railroad Company v. Derby*, *supra*, said, page 486:

"There may be found, in some of the numerous cases reported on this subject, dicta which, when severed from the context, might seem to countenance the doctrine that the master is not liable if the act of his servant was in disobedience of his orders. But a more careful examination will show that they depended on the question, whether the servant, at the time he did the act complained of, was acting in the course of his employment, or in other words, whether he was or was not at the time in the relation of servant to the defendant."

We have here as explicit a definition of what is meant by "course of employment" as it is perhaps possible to obtain. If the servant, at the time he committed the act complained of, was in relation of servant to the master, he is acting in the course of his employment, and it must be conceded that when the servant is entrusted with the service, the relation continues until it can be said the service has been fully performed or wholly abandoned.

"This question is simply whether the wrong inflicted was incidental to the discharge of the servant's functions. It may have been capricious. It may have contravened the master's purposes or directions. But a master who puts in action a train of servants, subject to all the ordinary defects of human nature, can no more escape liability for injury caused by such defects, than can a master who puts machinery in motion escape liability, on the ground of good intentions, for injuries accruing from defects of machinery. Out of the servant's orbit, when he ceases to be a servant, his negligences are not imputable to

the master. But within that orbit, they are so imputable, whatever the master may have meant." *Wharton on Negligence*, Section 160.

The case of *Patten v. Rea*, C. B. (N. S., 2), page 606, decided in 1857, contains some interesting doctrine. The driver in this case owned a horse and gig which was used in connection with the defendant's business. He was general manager of the defendant, and the horse and gig were kept upon the defendant's premises free of charge. Upon one occasion the driver and owner of the horse and gig used the same in making a call upon his physician. He said to defendant, however, that before he returned he would call upon one Smith and collect a bill which Smith owed the defendant. While he was on the way to see his physician the injury occurred. It was held the defendant was responsible, and that it was immaterial that the driver was also going on private business of his own. During the trial the learned judge put certain inquiries to the jury, and in response thereto the jury found that there was no verbal request by the defendant to the driver to take the horse and gig upon the defendant's business. Because of this answer to the interrogatory, the counsel for defendant obtained a rule nisi for a new trial, on the ground of misdirection on the part of the learned judge in not referring to the jury the question whether the horse and gig driven by the driver were used by him on his master's business at the instance and *express* request of the defendant. The question for review before the Queen's Bench was, whether this rule should be granted. Williams, J., said:

"The complaint is that my brother Cawder misdirected the jury in not leaving to them the question whether the horse and gig driven by Taylor were used by him on his master's business at the instance and express request of the defendant. Now it clearly is not necessary, in cases of this sort, that there should be any express request. The jury may imply a request or assent from the general nature of the servant's duty and employment."

Story v. Ashton. Q. B., 4 Law Reports, 476. It appears that defendant was a wine merchant, and sent his servant with a horse and cart to deliver some wine and bring back the empty

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bottles. On the return trip, instead of going to the defendant's place of business, the driver went in a different direction, at the request of another servant of the defendant, and on an errand for that other servant. In this case it was held that the defendant was not liable. It appears that when the servant went upon a mission for the other clerk, and on business personal to the other clerk, it was after business hours, and the servant was acting on his own time. In this case Cockburn, C. J., said:

"While I can not adopt the view of Erskine, J., in *Sleath v. Wilson*, *supra*, that it is because the master has entrusted the servant with the control of the horse and cart that the master is responsible, yet he was very far from saying, if the servant, when going on his master's business, took a somewhat longer route, that owing to the deviation he would cease to be in the employment of the master so far as to divest the latter of all liability. In such cases it is a question of degree as to how far the deviation could be considered a separate journey. If it is a question of degree or length of the deviation measured by time and distance, it becomes a question of fact properly left to the jury."

In the case just cited the extra distance driven by the servant was three or four miles, and perhaps consumed one or two hours. If this was a question of degree, or if such deviation could be said to be a question of degree as to the amount of deviation, and it should be left to the jury, how could it be said that going back a mile on Payne avenue, which at best would occupy not to exceed ten minutes, is not also a question of degree which should have been left to the jury.

In *Cunningham v. Castle*, 145 N. Y. Supp., 1057, it appeared that the servant borrowed the master's automobile and was using it for his own pleasure. It was held that:

"Whether the servant was acting within the scope of his authority, so as to render the defendant liable for his negligence, should have been submitted to the jury."

The question here turned upon the fact whether permission to use the car had or had not been given. In this case the court used this very emphatic and significant language (page 1063):

"It may be that it would be wise and in the public interest that responsibility for an accident caused by an automobile

should be affixed to the owner thereof, irrespective of the person driving it, but the law does not so provide."

Of course it is the province of courts to declare the law as they find it to be; but if it would be wise to fix responsibility upon the owner of an automobile, irrespective of who drives it, the courts will not strain a point or strain the rule of law to relieve the master where there is any doubt as to whether the servant, at the time of the injury complained of, was acting within the scope of his employment.

A very interesting case is that of *Sina v. Carlson*, 139 N. W., 601. In this case the driver of the wagon lived some miles in the country at the master's country home. On the day that the plaintiff was injured, winter being at hand, the servant desired to go to town to get overshoes and rubbers for himself, wife and child; and as an excuse for using the master's team, he took some of the furniture belonging to the master, located at the country home, to the master's city home. He was not authorized to do this, and in fact had been instructed not to do it, and the master had sent another team from the city to the country home for this furniture. It was held the defendant was liable. In the opinion, page 602, the court say, in speaking of the servant:

"Whether he was in fact acting within the scope of his agency, was fairly a question of fact for the jury. Olson, the driver, was in appellant's employ and driving appellant's team. He was admittedly acting, in part at least, in furtherance of the master's business, and not altogether for purposes personal to himself."

On this question, aside from being a question of fact for the jury, the court held that, even if the servant made a trip solely to make purchases for himself and family, and without the authority of the master or even in violation of orders, the defendant would notwithstanding be liable, for the reason that he was, in part at least, acting for the master and for the further reason that it appeared in evidence that the servant had repeatedly driven the master's team for purposes personal to himself.

In *Ewald v. C. & N. W. R. R. Co.*, 79 Wis., 428, in commenting upon the use which servants make of their master's cars to do errands of their own, the court say that the car may be said to

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be a "means and facility and advantage to which he was entitled by reason of his being an employee or servant, which entered into and became a part of the contract of employment, or merely incident and necessary to it.

That owners of automobiles know that their chauffeurs do these things is a matter of common knowledge, and they will be held to have impliedly assented to such use of the automobile. This rule has frequently been applied to cases where railway employees have been permitted to use an engine in going to and from meals. *St. L. Conn. Ry. Co. v. Reames*, 173 Ill., 582; *Reilley v. H. & St. J. Ry. Co.*, 94 Mo., 600; 146 Wis., 49.

The court said in *Sina v. Carlson*, *supra*, at page 603:

"The rule is, that if within the course of his employment an employee is permitted to use his employer's vehicle to facilitate the performance of necessary errands of his own, he is still an employee, while so doing, and the principle of *respondet superior applies*."

The case of *Quinn v. Power*, 87 N. Y., 535, is a case in point. The defendant was the owner of a ferry boat, running across the Hudson river between H. and A. While the boat was making its regular trip from A. to H. the pilot in charge took on at A. a boatman, agreeing without compensation to put him on board his boat, which was part of a tow passing up the river. The ferry boat was diverted from its course to reach the tow, and through the negligence of those in charge collided with a canal boat on which the plaintiff's intestate was at the time. The force of the collision threw the plaintiff's intestate into the river, and he was drowned. In an action to recover damages for the death, *held*: That those in charge of the ferry boat were at the time of the accident engaged in defendant's business, and he was responsible for their negligent acts.

This must proceed wholly upon the theory that when the boat started from A. to H. it had not completed its journey at the time of the accident; it was still engaged in the master's business; and the mere fact that a detour was made, and that the pilot in charge of the boat acted contrary to the defendant's orders, and did a thing which apparently was outside of the scope of his employment, yet inasmuch as the decedent's death was caused by the

negligence of the defendant's servants while the ferry was still on its journey, the defendant was held liable.

On page 539 of the opinion the court say:

"In deviating from it, that is, the regular course, the servants might disregard the instructions of the master, but they were none the less engaged in the master's business of transporting passengers from A. to H. because they did not follow the usual route, or there was another or even a forbidden track. They were still doing the employer's work, though in a manner contrary to his instructions. If they stopped the boat in the middle of the river, they did not cease to be engaged in the master's business. Even if the motive was some purpose of their own, they were still about their usual employment."

If it could be said in this case that by stopping the boat in the middle of the river, the servants of the defendant did not cease to be in the master's business, how long might they stop in the middle of the river? Would it not be a question of degree? And if so, would that not be a question for the jury?

In summing up the case the court, on page 540 of the opinion, say this:

"All the authorities, however, agree in the one important respect—that a violation of the master's instructions or a detour from the strict line of duty due to him by the servants, does not necessarily make the latter alone liable."

The court further say:

"These cases" (that is, referring to the authorities) "are useful to illustrate the idea that there may be a deviation from the servant's duty of employment, and that, too, for some purpose or from some motive of his own, without his ceasing to be an actor within the scope of his employment, and in the range of his master's business."

In the case of *Mitchell v. Crasswellar*, 13 C. B., 235, *supra*, a part of the first paragraph of the syllabus reads as follows:

"A master is responsible for an injury resulting from the negligence of a servant while driving his cart or carriage in his master's business, even though the accident happens in a place to which his master's business did not call him. But if the journey

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upon which the servant starts is *solely* for his own purposes, and undertaken *without the knowledge or consent* of his master, the latter is not responsible."

In our opinion, the case that is most directly in point and notes the trend of judicial opinion towards a more liberal construction of the rule holding masters liable for misconduct of their servants or enlarging the scope of the meaning of what is meant by "in the course of employment," will be found in the case of *Whimster v. Holmes*, 164 S. W., 236, decided February 16, 1914, by the Kansas City Court of Appeals, where it was held in the syllabus that:

"Whether a chauffeur, who was using a car in disobedience of the directions of his employer, and became intoxicated and ran over a man, was acting within the scope of his employment, held under the evidence for the jury."

It appears in this case that at 1:30 P. M. of July 10, 1910, the defendant's chauffeur drove him to the railway station, he intending to be absent from the city several days. Defendant testified that before he boarded the train he directed his chauffeur to take two friends up into the business part of the city, and then take the car home and put it in the garage. It was further shown that the chauffeur was to overhaul the car and make some repairs during the absence of the defendant, consulting with an expert in a certain public garage in the city for that purpose. It was shown that the chauffeur was at various places from 1:30 until 7:30 P. M. during a period of six hours, before he ran over the plaintiff. The chauffeur testified that after he had left the defendant's friends at their destination he went to an office of which the defendant was an officer and waited for his pay check until 3:30 P. M. He then went two more blocks to a laundry office for his collars. He then drove by a saloon on his way to 34th and Broadway, a distance of about thirty blocks, for the purpose of getting the advice of the expert, Rogers, concerning the overhauling of the machine; that Rogers and he drove the machine some distance to determine what repairs were needed; that he returned Rogers to the garage and then went to his own home for supper. After supper he went back to the public

garage and took the expert, Rogers, home. It was then near 7 o'clock. He then started for the defendant's home to put the car away. When he got near the defendant's home he found he missed his keys, and not knowing where he had left them or lost them, he went back to the garage to look for them; and that further than that he could not remember. The expert testified that the chauffeur got a drink of liquor at Westport on their first drive, and at another place when he was being taken home. The evidence tended to show that bottles of liquor were found in the machine, and that other persons, women and men, were seen in it; and for this reason the defendant claims the chauffeur was bound on his own pleasure, joy-riding. The court, on page 237, say:

"If he had gone directly home, and on the way had carelessly run over a pedestrian, no serious question could have been raised as to the course of his employment; but because there was delay in his reaching home, and because he went to other places and stopped on the way and took drinks of liquor, it is said in effect his course of employment ceased. That is little short of a statement that so long as an employee keeps within the orders of his employment he is in the line of his employment, but as soon as he violates an order he is out of it. That would come near meaning that no liability would be incurred by an employer for the wrong of his servant unless he orders him to commit the wrong. It was a part of the chauffeur's service to take the machine home; and that he was slow about it, or went in indirect ways, does not alter the matter, so long as he was in pursuit of that object. * * * That he had nearly reached home when he turned back to find his keys, and it was after turning back that he ran over the plaintiff; but that circumstance did not throw him out of the scope of his employment. If he lost his keys, it was his duty to go back and get them."

But surely we might say right here that the defendant was in no way responsible for the chauffeur losing his keys; and when he went back to get them, was he not in the pursuit of his own personal matters? The court further say:

"If an employer puts his chauffeur at the wheel of an automobile and starts him out, he is responsible for what that servant does in the way of negligence in running it for the purpose directed. It is no excuse for the employer to say that 'he became

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intoxicated, and I ordered him to keep sober;’ or that ‘he drove too fast, and I directed him to go slowly;’ or that ‘he went an indirect way, and I required that he go directly,’ provided, of course, he is engaged in the accomplishment of the service he set out to perform.”

In the case at bar, defendant’s chauffeur, Pelrein, was engaged in the service of going from his employer’s home on Shaker Heights to the Perry-Payne Building to take the defendant home. That was the purpose for which he started out; this was the controlling motive; and in all that he did he was governed by that controlling motive. And the mere fact that he turned back on Payne avenue a distance of a mile, which would in no event cause a delay of over ten minutes, does not take him out of the scope of his service, as he was still governed by the controlling motive to the Perry-Payne Building and take his employer home. The court further say:

“We recognize it as law that the owner of a machine would not be liable for the chauffeur’s conduct if the latter took the machine, without the owner’s knowledge, and went on a frolic of his own, alone or with others. Nor are we unmindful that a servant may start in a matter as a servant of an employer, and then abandon the service”—in which case there would be no liability; but, as the court say, “There was evidence tending to show that there was no abandonment of the service by the chauffeur in this case until after the plaintiff’s injury. His double effort to consult with Rogers, the expert, and to get the car home, was continuous, so far as was shown, unless it would be when he was taking Rogers home. And allowing that it ceased then, it was undoubtedly resumed, so far as getting the car home was concerned, when he left Rogers.”

And so too in the case at bar. If it can be held that Pelrein’s course was not continuous, and allowing that it ceased when he started back on Payne avenue, it undoubtedly was resumed again, so far as getting the car to the Perry-Payne Building and taking his employer home.

We have been at some pains in the examination and citation of these authorities and in commenting upon them, for the reason that there is no case decided in Ohio where the facts are precisely the same as in the case at bar.

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We hold, as trier of the facts, that Stephen Pelrein, at the time the plaintiff was injured, was within the scope of his employment as the servant of his master, the defendant, and that he was grossly and palpably negligent in causing the plaintiff's injury. Therefore, judgment will be entered against the defendant in accordance with the stipulation of counsel.

SCINTILLA RULE NOT APPLICABLE TO WILL CONTESTS.

Common Pleas Court of Franklin County.

MARY SCHNEIDER ET AL V. C. R. REITELBACH ET AL.

Decided, October, 1914.

Wills—Contest of—Trial by Jury in such Actions Not a Constitutional Right But a Statutory Sanction—Presumption of Validity and What is Required to Warrant Submission to the Jury—Procedural Rights Under the Original Code as Distinguished from Statutory Remedies.

1. The civil action created by the code, embracing as it does only the common law and equity actions, does not include the statutory remedy of contest of wills, in so far as the latter may be invested with the procedural incidents of the former.
2. The procedural rights which are attached to the original code of civil action such as right of appeal, constitutional trial by jury, and power of non-suit, do not apply to statutory remedies and other civil actions triable by the jury created by the Legislature pursuant to its power to extend such right.
3. The proceeding to contest a will is a statutory remedy or action, in which the right of trial by jury exists not by constitutional right but by statutory sanction. Hence it follows that the power of non-suit and the scintilla rule do not have specific application to such proceeding marking off the powers of court and jury as it does in the original civil action. The scintilla rule can have no application to such remedy because of the presumption of the validity of the will arising from the order of probate. To warrant submission of such a case to the jury the evidence must be such as not only to counterbalance such presumption, but to also tend to show lack of appreciation by the testatrix of her surroundings, of her relatives and their deserts and of her property. If it does not so tend to such appreciable extent as to counterbalance the pre-

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sumption of the validity of the will, and to prove the essentials of want of capacity to make a will, the function and duty of the court is to apply the law, and enter up judgment in favor of those sustaining the will.

Badger & Ulrey, for plaintiffs.

Abernathy & Davis, contra.

KINKEAD, J.

This is a proceeding to contest a will. At the close of plaintiffs' evidence a motion for judgment in favor of defendants was made. The question is one of power of the court in such cases, there being but a bare scintilla of evidence. This is a statutory remedy, not within the original contemplation of the civil action created by the code to which is attached the scintilla rule and power of non-suit. The power of granting a non-suit logically and historically applies only to the "civil action" created by the code, which embraces only common law and equitable actions. The rights and remedial processes incident to these classes of actions have at all times been recognized as part thereof and applied in procedure under the code as formerly, unless some provision is made to the contrary. Bench and bar have not always been mindful of the truth about these matters. The constitutional amendment conferring jurisdiction on courts of appeal in the trial of *chancery* cases is a striking instance where we are taken back to the truth about the law relating to the distinction between actions. It is indisputable that the civil action was not intended to take the place of statutory remedies of partition, dower, the extraordinary remedies, contest of wills, etc. The report of the codifying commission so specifically stated, and the courts specifically recognized the fact that the civil action was a substitute for all such judicial proceedings as were previously known as actions at law or suits in equity, and therefore did not embrace mandamus (*Chinn v. Trustees*, 32 O. S., 236). Statutory partition was not recognized as a civil action, but a special statutory proceeding (*Barger v. Cochran*, 15 O. S., 460). On the contrary, a suit in partition which is purely equitable, rather than merely statutory, was recognized as a civil action to be at-

tended with the remedial rights incident thereto (*Linton v. Laycock*, 33 O. S., 128). The importance of observing these essential distinctions is in properly applying the remedial rights incident to the action which its nature and character demands. For example, no appeal can be taken in pure statutory partition (*Barger v. Cochran*, 15 O. S., 460). But an appeal may be had in a strictly equitable partition (*Linton v. Laycock*, 33 O. S., 128). The limitations for commencing actions were held applicable to civil actions and not to mandamus (*Chinn v. Trustees*, 32 O. S., 236). These are convincing illustrations of the character of the civil action as distinguished from other remedies.

Bench and bar wandered away from these original ideals, coming to regard all statutory and extraordinary remedies as entitled to the remedial rules and incidents attached to the original civil action. Appeals were finally taken in statutory and extraordinary remedies on the ground that the statute authorized this mode of procedure because the right of trial by jury did not exist in such cases. So firmly entrenched was this idea in the minds of bench and bar that strong protest was made against the recent constitutional limitation of the trial of *chancery cases*, as if it was depriving litigants of long existing remedial rights. Such was not the case, for this amendment reenacts the law as it originally stood. When the code was enacted appeals were taken alike in law and equity cases. Recognizing the actual distinction between such cases under the code, the Legislature amended the statute limiting the right of appeal to cases in which the right to trial by jury does not exist. This amendment was made in 1859, and was made to conform to the ideas of the codifying commission as to the scope and meaning of the civil action, and to preserve the same methods of appellate procedure as had prevailed in the old procedure.

The interpretations of the code in relation to the procedural rights incident to the civil action were made with these things in mind. So when the non-suit and scintilla rule was established in *Ellis v. Insurance Co.*, 4 O. S., 628, it had reference solely to the civil action, which, according to the report of the

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commission and the intent of the Legislature, embraced only law and equity actions and excluded statutory and extraordinary remedies. We have considered historically the doctrine and power of non-suit in *Nicholson v. Scioto Traction Co.*, 14 N.P.(N. S.), 177. Its present day force and effect is later dealt with in *Gibbs v. Village*, 88 O. S., 18.

It is clear that the power to enter a non-suit exists only in the original civil action created by the code in the class of cases in which the right to trial by jury is inviolate under the Constitution. The scintilla rule marks the boundary line between the function of judge and jury. This power and the rule of evidence accompanying it has no application to other statutory remedies such as contest of wills, which is an extension of the right of jury to cases not originally contemplated. The scintilla rule of evidence has no relation to such cases. The procedure and the respective functions of judge and jury are prescribed by statute.

The issue "shall be tried by the jury" (General Code, Section 12082). The provision that the issue whether or not the writing is the will of the testator shall be tried by the jury would seem to require a submission of the case to the jury.

But the statutes and the law contemplates that though an issue be made up as required by statute, still when the evidence is produced there must be something to submit. The requirement of the statute does not contemplate that the court shall abrogate its power to declare the law. It is contemplated that there must be enough evidence offered by the contestant to in some degree prove that the testator did not have sufficient mental power to comprehend his own property, or to know the extent of his property, and the objects of his bounty and their deserts.

In *Wagner v. Ziegler*, 44 O. S., 67, the court treats the trial as analogous to a common law jury, holding that when the evidence is all in, the court determines whether any evidence has been given to sustain the claim of the party contesting. It holds that the statute requiring that the issue shall be tried to a jury was not intended to dethrone the court and make the jury su-

preme. The court holds that where the evidence does not tend to prove the issue a verdict may be directed.

There may be but a scintilla of evidence that merely tends to prove the issue. In such case the court may determine as a matter of law whether such scintilla is sufficient to counterbalance the presumption created by law.

In this case some eccentricities were shown, but it appeared that the testatrix was specially solicitous about her property and that she fully comprehended her relations to her relatives. There was indeed no evidence raising controversy concerning the essential requirements of the law requiring a submission to the jury. The disease with which the testatrix was afflicted was not shown to have had any appreciable effect upon her mental powers until the first acute attack in the last stages which was after the will was made.

None of the witnesses gave sufficient incidents which may be sufficiently regarded as having a tendency to show lack of appreciation of her surroundings, of her relatives, or of her property. On the contrary, being of Catholic faith and accustomed to follow her church and faith more strictly than do other sects, being alone and not having had intercourse between her relatives for a considerable period, her thoughts naturally turned to the persons who represented the religion or faith that she had followed a lifetime, and hence gave her property to the church.

The order is that the case is arrested from the jury, which is discharged from further consideration of the case, and judgment is entered in favor of the defendants.

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Wagar v. Lakewood et al.

ILLEGAL ATTEMPT TO WIDEN A ROAD.

Common Pleas Court of Cuyahoga County.

E. S. WAGAR V. THE CITY OF LAKEWOOD ET AL.

Decided, July 15, 1914.

Appropriation by a Municipality for Widening a Public Way—Injunction Against, Lies Where No Necessity Exists—And No Necessity Exists Where the Way Has been Narrowed from the Desired Width by Encroachments—Injustice of the Present Method of Fixing Compensation in Municipal Appropriation Proceedings—Binding Character of a Consent Decree.

1. A claim of lack of jurisdiction on the part of county commissioners to establish a new way can not be based on the failure of the record to state that the required notice was given, where the record does contain the statement that no objection was made to the proceedings, and the road as thereafter laid out has been in continuous use for ninety years.
2. The court finds that the road here in question (now a city street) originally laid out at a width of sixty feet, that its lines as so established were recognized by early village records and confirmed by decree of court, and that its present width of only fifty feet is due to encroachments by the property owners on one side.
3. Such being the case no "necessity" exists for widening the way to sixty feet by appropriating a strip ten feet in width on the side opposite the encroachments, and no necessity existing the proposed appropriation can not be legally made, and injunction lies against such proceedings.

White, Johnson, Cannon & Neff, for plaintiff.

Robert G. Curran, contra.

FORAN, J.

Some time early in January, 1914, a petition "from property owners on Warren road to widen and pave said road" was presented to the council of the city of Lakewood, Ohio, and "referred to the committee on streets and the director of public works, law and finance." This committee, on January 27, 1914,

reported to the council that at a meeting held January 23, 1914, "it was the consensus of opinion that this road, from Detroit street to Madison avenue, should be made a *sixty-foot* street, and that a ten-foot strip on the easterly side thereof should be purchased or appropriated." The committee therefore recommended that proceedings be at once taken to obtain possession of ten feet of land mentioned in their report, and that the clerk be requested and instructed to obtain the necessary signatures for the appropriation of said ten feet of land. The report of the committee was approved by the council January 27, 1914, the day it was presented or made.

The evidence shows that the city of Lakewood owns and is in possession of land which has a frontage of about seven hundred feet on the westerly side of Warren road, extending from Detroit street southerly toward Madison avenue, on which is located the city hall and fire station, and a school building, a portion of which is occupied by the board of education. The board of education of municipal corporations is empowered by statute to acquire and hold property, but the property so acquired and held by it is held in trust for the municipality; and therefore it may be properly said that the city of Lakewood is the real owner of the property occupied for school purposes.

The westerly side of Warren road is more closely built up than the easterly side, and as the protest or prayer for injunction comes from the owners of property on the easterly side of the road, it is quite evident that the signers of the petition to "widen and pave said road" were largely, if not wholly, owners of property on the westerly side of the road.

In accordance with the recommendation of the committee on streets, a resolution known as No. 1376 was prepared and adopted or approved by the council March 3, 1914. The preamble of this resolution declares: "the necessity for and the intention to appropriate for public use for street purposes for widening and altering Warren road between Detroit street and West Madison avenue, certain property described in the resolution, all of which is located on the easterly side of Warren road."

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To carry this resolution into effect, ordinance No. 10005 of the city of Lakewood was prepared and adopted March 17, 1914. The preamble of this ordinance is, "An ordinance to appropriate property for street purposes for widening, altering and improving Warren road between Detroit street and West Madison avenue"; and by Section 1 provided that "an absolute title in fee simple to the land therein described is hereby appropriated to public use for street purposes, for altering, widening and improving Warren road between Detroit street and West Madison avenue," the lands described in the ordinance being the same as in the resolution, and being wholly located on the easterly side of Warren road.

By Section 2 of this ordinance, the director of law was authorized and directed to apply to a court of competent jurisdiction to have a jury empaneled to make inquiry into and assess compensation to be paid for such estate in fee simple.

In accordance with the provisions of this ordinance, proceedings to appropriate the land therein described were thereafter begun in the insolvency court of this county.

On the 25th day of March, 1914, the plaintiff, as a resident tax-payer of the city of Lakewood, filed her petition in this court, averring that she, on the 21st day of March, 1914, made a written demand upon R. G. Curran, Esquire, the director of law of said city, to begin an action to restrain the city of Lakewood from misapplication of the funds of said city, and the abuse of its corporate powers in passing said ordinance and threatening to appropriate the land therein described. That said director of law refused to commence said action, and the plaintiff therefore begins this action in her own name on behalf of the city.

In her cause of action the plaintiff says that Warren road was laid out by the county commissioners of Cuyahoga county, Ohio, in 1894, as a sixty-foot road; and that some time thereafter the lines of the road, owing to disputes that arose, were re-established by the county surveyor under direction of the county commissioners. That about 1906 the village of Lakewood, predeces-

sor of the defendant city, claiming the easterly line of the road was considerably farther east than was asserted by the owners of property on the easterly side, was about to seize a strip of land on the easterly side of the road, and that Francis H. Wagar brought an action in this court asking that the village be restrained from so doing, which action was decided in favor of the said Francis H. Wagar, and then appealed to the circuit court of this county, and upon hearing in said court the location of Warren road was fixed and determined and the defendant perpetually enjoined from disturbing the plaintiff, his heirs and assigns, in the possession of his property east of the east line of said Warren road as therein determined.

She further avers that the owners of property on the westerly side of said road have encroached upon the road at least ten feet, and the defendant city has encouraged this encroachment by encroaching itself on said road by accepting lands and occupying them, which lands encroached ten feet on said road; and that its engineer, under its direction, has given property owners along said street or road, and on the westerly side thereof, a line ten feet easterly of the true west line of said road.

The plaintiff avers the adoption of the resolution and ordinance herein referred to, and says in substance that real purpose of the defendant city, in collusion with property owners on the west side of Warren road, is to unlawfully keep the ten feet of land now in their possession along the westerly side of said road, under the guise of altering, widening and improving the road; and that the road being now sixty feet wide, there is no necessity or any good or sufficient reason for the appropriation, and that the same is an illegal and arbitrary abuse of power and discretion on the part of the council of the defendant city, as well as a betrayal of its public trust.

The petition contains, in addition to the usual prayer for injunction, a prayer for a mandatory injunction requiring the city of Lakewood to open up the westerly ten feet of said road now unlawfully in possession of the defendant and other property owners on the west side of said road. This prayer for

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mandatory injunction, however, has been withdrawn, and will not be considered.

The defendant city, in its amended answer, admits that the plaintiff is a resident tax-payer, and that she made a written request upon the director of law to begin an action, and that said director of law refused to comply with said demand. It admits that one Francis H. Wagar brought an action against the village of Lakewood, as alleged in the petition, which was appealed to the circuit court, wherein a decree was entered; admits that the defendant owns premises on the west side of Warren road at the corner of Detroit street, and extending back a distance of 397 feet; admits the passage of the resolution and ordinance, as alleged in plaintiff's petition, and admits that it intends to appropriate the parcels of land described in said resolution and ordinance. But it says in its second defense that in the action brought by Francis H. Wagar against the village of Lakewood issue was joined and tried respecting the record of said road, and decree rendered therein by said circuit court wherein and whereby it was found and adjudged that there was no record of said Warren road. In its third defense it says that neither location of the west line of Warren road nor the width of said road can be determined from the east line as described in said decree, for the reason that said easterly line was fixed in said decree by agreement of the parties; and further, that in the first paragraph of said decree the finding was made that certain fences maintained by said Francis H. Wagar, were on the easterly line of Warren road, and that the line of said fences was the easterly line of Warren road; but that in a subsequent part of the decree the easterly line of Warren road was described by monuments and determined to be the easterly line of Warren road; and that the line so described by monuments and determined as said easterly line is not the line of fences referred to in the first paragraph of the decree, but that the line described by monuments was fixed by agreement of the parties and inserted in said decree.

The answer further avers that the property owners on the west side of Warren road are necessary parties to this action,

for the reason that said property owners claim all of the land occupied by them, and claim that they are not encroaching in any manner upon said Warren road.

The testimony discloses that Detroit street, running westerly from the Cuyahoga river, passes practically through the center of Lakewood in a general westerly direction; that Warren road intersects but does not cross Detroit street about one mile east of Rocky river, and runs due south or nearly so.

At the December session, 1823, of the county commissioners of Cuyahoga county, Ohio, the petition of Moses Wagar and others for the opening of Warren road came before the board. There being no objection, the proceedings were read, and "ordered to be recorded and road sixty feet in width." See commissioners' journal and record of bonds, journal one, pages 71-72.

At the March session, 1824, of the board of county commissioners, the petition again came before the board, when the report of the committee to whom the matter had been referred and the report of the county surveyor were read, and no objections being made, "said road was ordered to be recorded."

The course of the road and its length were minutely set forth in the record, which ends in these words: "That said road be opened sixty feet in width, and that an order opening the same issue accordingly." See Road Record A, 179.

These proceedings were had under and by virtue of the act of February 26, 1820, of the General Assembly of the state of Ohio, providing for the opening, establishing and repair of roads. 2 Chase, 1149.

These records were challenged and objection interposed to the introduction of this evidence, for the reason that the records of the county commissioners do not show that the provisions of Section 3 of the act were complied with. This section provides, "that previous to any application being made for an order to lay out a new road or alter an established road, such intended application shall be advertised in three public places in each township through which such proposed road may be designed to run, at least thirty days prior to the meeting of the commissioners

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to which the application is intended to be read." It is insisted that because the record fails to show that the notice therein provided for was given, the board of county commissioners had no jurisdiction and was without power to act, and that its action in the premises was void.

The trouble with this objection is, that notwithstanding the commissioners did not have power to lay out Warren road, yet its existence is a palpable visible fact, and has been so for ninety years. If there is any force in the objection, it comes too late. The defendant city is using and has property on the street or road, and the public has used it for ninety years. It will be presumed that public officers perform the duty prescribed by law. At each session of the board, the record shows no objection was made. The object of the notice provided for in Section 3 was to afford an opportunity for objection; and if the secretary of the board deemed it necessary to record the fact that no objection was made, it would seem the notice had been given.

In the case of *McClelland v. Miller*, 28 O. S., 488, it is said in the syllabus:

"The statute prescribing what shall constitute the record of the road does not require that all preliminary steps should appear therein, and when the report, survey and plat have been recorded as directed by statute, it will be presumed that all was done which the law required should be done, where the road has long been opened and used with the acquiescence of landholders adjoining."

If this were not sufficient to indicate that the objection is not well taken, it may be said that the village of Lakewood, the predecessor of the defendant city, in its answer in the case of *Francis H. Wagar*, above referred to, distinctly avers that "along the west side of plaintiff's premises is a highway known as Warren road. That said highway was laid out by the county commissioners of Cuyahoga county, Ohio, about the year 1823. That said road had a width of sixty feet, thirty feet on either side of the center thereof. That said plaintiff has been encroaching on this highway." Surely the defendant herein, after this averment, ought to be estopped from now saying that Warren road

was not laid out originally as a sixty-foot road, and that the county commissioners had no authority to lay out said road, or that their action in the premises was void.

Further objection is made that the record of the county commissioners fails to disclose that the road therein referred to and described is the road now known as Warren road, or, in other words, that it was not described therein *eo nomine*. That the road in question has been known as Warren road during all these ninety years, is not denied. Besides the record describes the road as "beginning at the corner of John B. Kidney and Moses H. Wagar's land, in section No. 22, thence running in a southerly course until it intersects the road on the north line of section No. 2 in Rockport." The land and road records of this county show that the land of Moses Wagar was, as is indicated in this record, and that the road is on the west line of section No. 22. Besides, as has been already stated, the village of Lakewood, in its answer in the Francis H. Wagar case, distinctly states and avers that the name of this highway was known as Warren road.

It must therefore be conceded, and it is so held as matter of fact, that the road in controversy is the road described in the county commissioners' record introduced in evidence; that the road was laid out sixty feet wide, and the land included in the description legally appropriated for road purposes by virtue of the statutes then in force. The owners of the land through which the road ran were absolutely and forever divested of all title thereto, unless the road was thereafter wholly abandoned, and the heirs or assigns of these owners never acquired a shadow of title or interest in the land included in the description, except the right of free and unrestricted access thereto. Unquestionably the road, after being laid out, was fenced, as were all roads at that time, and on the lines and courses fixed and determined by the county commissioners in accordance with the report of the county surveyor, which we find to be specific, definite and accurate; but forever "time rolls its ceaseless course," and fences are no more able to defy his gnawing teeth than man. The fences decayed or were in many instances thrown down or

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destroyed, and when rebuilt it would be too much to expect that they were always replaced on the exact lines of the road. The roadway itself was only sufficiently wide for road purposes, as the citizens expended no more labor or money than was absolutely necessary. Encroachments on the land thus appropriated for public use were gradually made in some instances designedly and in some instances unconsciously.

In the meantime the city of Cleveland grew apace, and suburban lands became valuable, too valuable for farm use. The lands in Lakewood west of Warren road were allotted for residence purposes; a portion of the township of Rockport was incorporated as the hamlet of Lakewood, which subsequently became a village, and is now a city. Encroaching owners of real estate abutting on Warren road, reluctant to vacate the land unlawfully occupied, sought in various ways to protect their holdings. The east side abutters charged the west side abutters with encroaching on the road, and they in turn insisted that the east side owners were the encroachers on the road. Both sides recognized the road was sixty feet wide, that land necessary for a sixty-foot road had been appropriated, and that encroachments had been made upon it. This fact has never before been denied, and is not now seriously controverted. It is also admitted that no attempt was ever made, by encroachment or otherwise, to close the roadway or abandon it as a public highway. It must also be admitted, as matter of law, that title to any portion of a public road can not be acquired by prescription or occupancy, no matter how long such occupancy continues, provided a sufficient portion of the road remains open to accommodate public travel and use.

In *McClelland v. Miller*, 28 O. S., 488, *supra*, the plaintiff claimed that he had possession of a strip of ground which he had enclosed for more than twenty-one years, and therefore had title to the land so enclosed. Defendant was supervisor of roads, and claimed in his answer that the plaintiff's premises adjoined the highway which had been laid out sixty feet wide, and that the land claimed by plaintiff was a part of this highway upon which

he had encroached. The court, page 502, referring to the claim of the plaintiff, say:

“This position is answered by the case of *Lane v. Kennedy*, 13 O. S., 42. The doctrine of that case is that the mere inclosing of a part of a highway by a fence, does not necessarily constitute such adverse possession, as against the public, as will confer title by mere lapse of time.”

In *Heddleston v. Hendricks*, 52 O. S., 460, it is said in the syllabus:

“The right of an adjacent land owner to enclose by a fence, however constructed, a portion of a public highway can not be acquired by adverse possession, however long continued.”

There is some doctrine in 5 O. S., 594, to the effect that a person erecting a permanent improvement, such a large building as a church or block, and by so doing indicating an intention permanently to appropriate land, a question of adverse possession might arise; but wherever this case has been referred to subsequently by our Supreme Court, it is with apology rather than approval. If the whole of the land devoted to a road or appropriated for a road is so enclosed that public travel is prevented, a different question might arise if the road were so enclosed for twenty-one years.

During the last twenty-five years Detroit street has been twice graded and paved. It was for many years a turnpike toll road. If there were ever any monuments on Detroit street at the intersection of Warren road, indicating the exact lines of Warren road, they were long since torn out or obliterated. A few years prior to 1906—just how long prior to that time we are unable to say, but evidently not very long prior to that year—an iron pin was placed at the intersection of Warren road with the center of Detroit street, and defendant city now claims this pin as a monument from which the east and west lines of Warren road are to be determined. It is not claimed that this pin is an ancient monument. Indeed it must be admitted, if it be a monument at all, it is of very recent date. When this road was

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laid out in 1824 iron pins were unknown as monuments. In many things outside of monuments of title, that was a neolithic age. There is no evidence in the record showing by whom or by what authority this iron pin was placed as now located. The location, however, of the iron pin was clearly *ex parte* and arbitrary, and concludes no one except insofar as it has been used by the courts as a point in determining the east line of Warren road. A singular and significant fact with respect to this iron pin is, that it was located exactly thirty feet east of the west line now claimed by the defendant and other property owners to be the west line of Warren road, and exactly twenty feet west of the fence lines or line claimed to be the east line of Warren road by land owners on the east side of that road. Indeed owners of real estate abutting on the west side of Warren road, previous to the location of this iron pin, had run their eastwardly lines on a line exactly thirty feet west of the point where the pin was located. If this was a coincidence, it was one that evidently had power to think. It is inconceivable that during the lapse of ninety years the fences on the west line of Warren road remained, or, if rebuilt, were placed precisely to an inch on the west line of Warren road as originally laid out. As has been said, the location of this iron pin, whenever placed, was *ex parte* and arbitrary, and the record does not disclose that anybody was heard at the time the pin was placed where it is now located. If there are any records in the office of the city engineer of Lakewood justifying the location of this iron pin, they were not produced, and it is therefore only fair to presume that there are no such records. If there are any records of the village council of Lakewood ordering the location of this iron pin as now officially located, they were not introduced; and if such record exists, it is fair to presume it would have been produced unless prejudicial to the defendant city's claim. We can not escape the conclusion that an interested party or parties placed this iron pin where it is now located, and we believe the defendant city could, without serious effort, produce these parties. Indeed we are of the opinion that the records of the defendant

city might show that a party or parties vitally interested were at that time in the city council. At all events, shortly after the iron pin was placed where we now find it, the village of Lakewood, through its street commissioner, in July, 1906, was about to enter upon and take possession of a strip of land ten feet wide on the east side of Warren road and extending from Detroit street to West Madison avenue, when it was enjoined from so doing by this court in a suit brought by Francis H. Wagar August 3, 1906. The main contention of the plaintiff in that action was, that there existed a fence on the east line of Warren road which was on the line of a preceding or prior fence, and that these fences existed on the same line for more than seventy years, and that he and his ancestors had continuous, exclusive and uninterrupted occupancy and possession of the land up to this fence line for more than seventy years, and that said fence line was the easterly line of Warren road. The location of the east line of Warren road was fairly raised by the allegation of the petition.

The village of Lakewood in its answer admitted that Warren road, as originally laid out in 1823, "had a width of sixty feet, thirty feet on either side of the center thereof, and that said plaintiff has been encroaching on this highway, and had put his fence out 16½ feet, more or less, in said road." So that the question before the court for determination was the east line of Warren road. On issue joined and after full hearing, many witnesses being called and numerous records introduced, the common pleas court found for the plaintiff, and by its decree established the east line of the road. The court in its decree found that the line asserted by the defendant, the village of Lakewood, to be the center line of Warren road is "a line drawn from the aforesaid iron pin, situated in the intersection of Warren road with the center line of Detroit street, to a stone located at the intersection of Hilliard avenue, and thence proceeding southerly to three stones situated at the center of W. Madison avenue, as now located, with said Warren road. This was the line claimed by the defendant village in its answer. The court then pro-

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ceeded and found that the strip of land, which the plaintiff claimed in his petition the defendant village was seeking to seize, was "bounded on the west by a line beginning at the intersection of the southerly line of Detroit street at a point which is $13\frac{1}{2}$ feet easterly of said line claimed by the said village measured on said southerly line of Detroit street; thence running southerly to a point $17\frac{7}{10}$ feet easterly of said line claimed by said village, where it intersects said stone at the intersection of Hilliard avenue with said Warren road." In other words, the common pleas court decree found that the east line of Warren road was a line $13\frac{1}{2}$ feet easterly of the line claimed by said village as indicated by the before-mentioned iron pin.

The cause was appealed to the circuit court by the village of Lakewood, and by that court the judgment and decree of the court of common pleas was in all respects affirmed, except as to a slight difference in the location of the east line of Warren road. On this point the circuit court decree, after finding substantially as the court of common pleas found, found that the strip of land which the plaintiff claimed the defendant village was about to seize, and from doing which they were perpetually enjoined, is described as "a strip of land on the westerly side of plaintiff's land extending from the southerly line of Detroit street as it is now located to the northerly line of West Madison avenue, as it is now located, and bounded on the west by a line beginning at the intersection of the southerly line of Detroit street at a point which is twenty feet easterly of said line claimed by said village as the center line of Warren road, measured on said southerly line of Detroit street, thence running southerly, parallel to said center line of Warren road as claimed by said village, to a point on the northerly line of said West Madison avenue which is twenty feet easterly of said line claimed by said village, measured on a line which is a continuation of said northerly line of said West Madison avenue as now located."

It will be noticed that the line of Warren road as determined and fixed by the court of common pleas is a line beginning at the southerly line of Detroit street $13\frac{1}{2}$ feet east of the iron pin

situated in the intersection of Warren road with the center line of Detroit street, and thence running southerly to West Madison avenue; and this line at the intersection of Hilliard avenue, an avenue between Detroit and West Madison, is 17 $\frac{7}{10}$ feet east of the line claimed by the village. The circuit court decree fixed the east line of Warren road at a point twenty feet east of the aforesaid iron pin in the intersection of Warren road with the center line of Detroit street, thence running southerly, parallel with the center line of Warren road as claimed by the village, to a point on the northerly line of West Madison avenue, which is twenty feet easterly of the line claimed by the village, making the line from Detroit street to West Madison straight and at all points twenty feet easterly of the center line of Warren road as claimed by the defendant village.

By this decree of the circuit court the plaintiff, Francis H. Wagar, lost 6 $\frac{1}{2}$ feet of land near the southerly end of Detroit street. The line established by the circuit court, as it runs southerly, intersects or merges at Hilliard avenue with the line established by the common pleas court decree, and then diverges or trends slightly to the west from Hilliard to West Madison. The circuit court decree was much more favorable to the village inasmuch as it secured an east line at all points parallel to the line defendant claimed is the center line of Warren road; and besides the land it secured near the southerly line of Detroit street was at that time and still is vastly more valuable than the land it lost, as the line runs from Hilliard to West Madison. It is important to remember this, as the defendant city, successor to the defendant village, now claims it was not bound or concluded by the circuit court decree, for the reason, as it insists, that the latter decree was a consent decree, the result of a compromise between the parties, the contention being that the plaintiff, being an heir of Francis H. Wagar and seeking the aid of a court of equity in executing a former decree in favor of her ancestor, she does so at the risk of opening up such decrees as respects the relief to be granted in the new suit. This contention is in the nature of a collateral attack upon the decree of the circuit court. This claim can not be successfully urged.

A judgment or decree is "a record of the highest character, importing absolute verity, and works a conclusive estoppel upon parties or privies to aver or prove anything against it. It speaks for itself, and when it has spoken the parties to it at least are bound to be silent. Without overturning the very foundations of the law, we are bound to hold that it can only be impeached upon a direct proceeding brought to reverse or annul it." *Bank of Wooster v. Stevens et al*, 1 O. S., 233.

It would be a waste of time to cite authorities in support of this proposition.

Counsel for defendants cite many authorities, mostly federal cases. As the doctrine announced in these cases is substantially identical, we need only refer to one, the case of *The Lawrence Manufacturing Co. v. Janesville Cotton Mills*, 138 U. S., 552. This was a case to enjoin the use of a trade-mark. Before the case was reached for trial an agreement was entered into between the parties, by the terms of which the defendant agreed not to use the trade-mark on any goods of their manufacture after the first day of July, 1886, in consideration of which the plaintiff was to dismiss its suit and release all claims for damages. By the consent decree subsequently entered, however, the case was not dismissed or discontinued, but on the contrary a perpetual injunction was decreed against the defendant, restraining it from using the trade-mark after July 1, 1886. The decree was in accordance with the stipulation, except as to the dismissal or discontinuance of the suit, in place of which an affirmative decree in the plaintiff's favor was submitted. In the plaintiff's view, the decree was left incomplete, and it sought to have it pieced out and then enforced under a prayer for general relief. The court held that "when a party returns to a court of chancery to obtain its aid in executing a former decree of that court, the court is at liberty to inquire whether the decree was or was not erroneous. If it be of opinion that it was erroneous, it may refuse to execute it."

It will be noticed that in this case the plaintiff was seeking to take advantage of its own wrong. The consent decree was not

in accordance with the stipulation or agreement made between the parties at the time the decree was entered. The facts in that case do not justify the claim of the defendant in this case. We can see no distinction between a decree by consent and one announced by the court from the bench. In either case, when it is entered it is the *ex cathedra* utterance of the court. It is said in 23 Cyc., 1057, in the text:

“The rule against collateral attack applies to judgments entered upon confession, either in open court or under warrant of attorney, and also to such as are rendered by consent of parties as the result of a compromise or settlement.”

In *Wells v. Warrick Martin & Co.*, 1 O. S., 386, it is said in the syllabus:

“A judgment of a court of competent jurisdiction rendered by consent of parties will not be reversed on error.”

In *Jackson v. Jackson*, 16 O. S., 163, this doctrine is affirmed:

“So that whatever other errors the court may have committed, there surely was none in making or rendering such final judgment as the parties consented to have entered in the case. If it be substantially decisive of the case, whatever its form may be, it is conclusive between them and will not be reversed on error.”

It is further contended that the west side of abutting owners on Warren road were not parties to the suit of Francis H. Wagar, and therefore not bound by the decree.

The village of Lakewood, representing the public, these owners included, was a party to that suit. The case was one of general interest and notoriety. It was fully heard, and every citizen who knew or claimed to know anything about the facts was called as a witness, records, maps and data of every kind that could be procured were presented to the court, several weeks being consumed in the trial of the case.

However, the question now before the court is not whether the west side abutters are bound by the former adjudication, but whether the defendant city, the successor of the defendant village, is bound by the adjudication in that case.

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It is admitted by all and denied by none that Warren road, as originally laid out, was sixty feet wide, and that encroachments upon this sixty feet have occurred. The village of Lakewood either arbitrarily fixed or accepted a line arbitrarily fixed by some one as the center line of Warren road, and claimed the right to remove obstructions or encroachments found within thirty feet on either side of the line so fixed or determined. The circuit court decree found there were no obstructions or encroachments within twenty feet eastward of the said line, and it follows inevitably that the center line of Warren road, so fixed or accepted by the village of Lakewood, was not the true center line of said Warren road, but was and is today ten feet easterly of the true line.

If the decree was the result of a compromise, the village accepted the terms of the decree by a solemn act of its council, as that body passed a resolution accepting the terms of the decree authorizing its solicitors to have the decree entered of record. This resolution is known as resolution 1002. It authorizes its solicitors "to settle the litigation on the terms set forth in said journal entry, said journal entry providing, in substance, that the eastern boundary of Warren road shall be a line running parallel with the monumented center line of said Warren road and twenty feet to the easterly line thereof."

Here we find that the village of Lakewood, by solemn act of its council, declared that the easterly line of Warren road shall be a line running southerly, twenty feet easterly and parallel with it, of the line before that time claimed by the village as the center line of Warren road. The village of Lakewood, acting for all of the citizens of said village, through its council, by this resolution fixed and determined forever the easterly line of Warren road; and in so doing, it having admitted that the road was originally laid out sixty feet wide, it follows inevitably that the westerly line of Warren road is forty feet west of the monumented center line claimed by the village at that time. In the proceedings of Francis H. Wagar against the village, the defendant admitted and declared that this road, as originally laid out

in 1823, had a width of sixty feet. Hence, as has been said, the westerly line of the road must be sixty feet westerly of the easterly boundary line fixed and determined by the circuit court; and by ordinance of the village itself it accepted and declared this to be the easterly line. Even if the decree could, as matter of law, be attacked collaterally, the defendant city, as the successor of the defendant village, will not be heard to take advantage of that to repudiate its own act.

The authority mainly relied upon in support of the contention that abutting owners on the west side of Warren road are not bound or concluded by the circuit court decree, is *Lang v. Wilson*, 119 Ia., 267. The petition in the case alleged that the defendant, by its conduct, was preventing the plaintiff from access to a public street by encroaching thereon by erecting a dwelling, building fences and planting trees so as to prevent the use of all the street except a strip thirteen feet wide. The prayer was that the obstruction be abated. The defendants answered that they acquired the premises known as Block 4 by purchase, and that in a suit against the city to fix or establish the boundaries of this block and quiet title a decree was entered fixing boundaries as claimed by defendants. The court said, page 269:

"It may not be of importance to the general public whether a particular street is vacated or not. It is important to the individual owner of abutting property that he shall be able to get to and from his residence or business. In such a case access to thoroughfares connecting his property with other parts of the town or city has a value peculiar to him, apart from that shared in by citizens generally, and his right to the street as a means of enjoying free and convenient use of his property has a value quite as certainly as the property itself. * * * Under the allegations of the petition, then, shutting off the approach to the plaintiff's homestead, was the taking of his property, and of this there has been no adjudication."

It will be noticed that the facts in this case are decidedly different from the facts in the case now before us. The owners of property on the west side of Warren road, as found by the circuit court decree, never had any title to the ten feet of land

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to which they now lay claim; and taking that ten feet or strip ten feet wide from them will in no way shut off their approach to Warren road. The circuit court decree took from them no property or anything of value, for the simple reason that they never had any title to this land; and in taking it away from them, they could not say that they lost a thing of value; for if they never owned it, they can not lose it in the sense of losing something they were entitled to hold.

The real reason for seeking to take property on the east side of the road will be found in the brief of counsel for the defendant, where it is said: "The west side lots are shallow lots." But there is no valid reason why they should unlawfully hold ten feet of land they do not own, and at the same time demand a sixty-foot street at the expense of their neighbors. If the city of Lakewood is willing to consent to and participate in this loot of the public, the beneficiaries, in common decency, should keep quiet about it and be satisfied with a fifty foot street. It is no answer to say that the party from whom land is proposed to be taken will be compensated. Everyone knows that the fifth federal amendment, forbidding the taking of property without just compensation, is, in eminent domain proceedings, of practically little efficacy. The constitutional provision that compensation shall be assessed without deduction for benefits is evaded by the holding that compensation is not synonymous with damages; that is, that compensation means a sum of money which will compensate for the land actually taken. Damage to the part not taken is not embraced in the constitutional provision; and if there are any such damages, then special benefits conferred upon the land owner by reason of the improvement may be deducted.

This doctrine based upon a subtlety and refinement of reasoning that baffles the ordinary mind, is so well settled in this state that citation of authorities is wholly unnecessary.

Herein lies the injustice of the proposed appropriation, that the west side abutters of Warren road shall unlawfully hold public property, while the east side abutters shall surrender private property without full compensation, as a portion of what may be

assessed, if the property is taken, can be charged back by way of benefits.

The main questions, however, are these: First, is there any necessity for the appropriation? Second, is it for a public purpose?

The committee on streets reported it was the consensus of opinion that this road (Warren) should be made a sixty-foot street from Detroit street to Madison avenue. But that was the "consensus of opinion" of the county commissioners ninety years ago, and they laid it out sixty feet wide. If it is a sixty-foot street now—and we so find—then the further "consensus of opinion" of the committee, that "a ten-foot strip on the easterly side thereof should be purchased or appropriated," would make a seventy-foot street if the "consensus of opinion" prevails.

That there must exist a necessity for the taking, and that the appropriation is for a public and not a private purpose, are fundamental. See *Cincinnati, etc. Ry. Co. v. Clinton Co.*, 1 O. S., 77; *Reeves v. Wood County*, 8 O. S., 346; *State v. Guilbert*, 56 O. S., 575; 50 O. S., 603, affirming 6 N. P., 537; 8 O. D., 268; also 26 Bull., 172.

In order to justify the exercise of the power of eminent domain, the purpose to which the property taken is to be applied must be public, primarily public, and not primarily a private interest incidentally beneficial to the public. *Madisonville Traction Co. v. Mining Co.*, 196 U. S., 239.

But it is said an assessment made by the council is not only presumed to be valid, just and proper, but is conclusive upon the court unless fraud or oppression is alleged and proved.

This statement is too broad, and the authorities cited do not support it. The right to exercise the power of eminent domain, it is true, can only be derived from legislative enactment, but it is to be strictly construed against the grantee and liberally in favor of the public, and must not be extended beyond its express terms. *Railroad Co. v. Defiance Co.*, 52 O. S., 262; *Anderson v. Hamilton Co.*, 12 O. S., 643.

By virtue of Section 3629, General Code, municipalities have power to "widen" streets. The proposed action of the city of

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Lakewood is not to "widen" Warren road, for it clearly appears that the purpose is to appropriate ten feet of private property so that the road may be made sixty feet wide; and as the road is already sixty feet wide, the proposition involves a self-evident contradiction. Under the guise of invoking this extraordinary power, ostensibly for the benefit of the public, the defendant is really seeking to grant, by substitution, the land it proposes to take to itself and certain private persons; in other words, the appropriation is for a private and not a public purpose.

In *Corwin v. Cowan*, 12 O. S., 63, it was said that the power of the Legislature, under the Constitution of 1802, to take from the owner the absolute fee simple of his land without any other compensation than the benefits to result from the uses for which the land is taken, and then to abandon those uses and sell the lands to be held and used by the purchaser as private property, is, to say the least, very questionable. It seems in effect to be the taking of private property for private use without any compensation whatever.

We think that, in effect, the city of Lakewood, if permitted to appropriate the land mentioned in the ordinance, will be taking private property for private use, and practically without any compensation.

The right to exercise the power of eminent domain depends upon the demand and requirement of the public interest; and it is well settled that the Legislature can not, directly or indirectly, take private property for private use or private purposes. 1 O. S., 77; 8 O. S., 346; 12 O. S., 633; 25 O. S., 91.

It is quite evident from the facts in this case that the city of Lakewood is seeking to take private property, ostensibly for a public use, but indirectly the result, if the appropriation is permitted, will be a benefit to private persons, and therefore the taking must be held for a private use or purpose.

In *Madisonville Traction Co. v. Mining Co.*, 196 U. S., *supra*, Mr. Justice Harlan says:

"It is erroneous to suppose that the Legislature is beyond the control of the courts in exercising the power of eminent domain,

either as to the nature of the use or the necessity for the use of any particular property, for if the use be not public, or no necessity for the taking exists, the Legislature can not authorize the taking of private property against the will of the owner, notwithstanding compensation may be required."

Dillon on Municipal Corporations, Section 1036, is cited in support of the defendant's contention that the courts can not interfere with legislative grant of power to municipalities, unless fraud or oppression be shown. But in the section quoted (that is, Section 1036) the writer says:

"But the question whether the specified use is a public use or purpose, or such use or purpose as will justify or sustain the compulsory taking of private property, is perhaps ultimately a judicial one; and if so, the courts can not be absolutely concluded by the action or opinion of the legislative department."

It was further held in *Madisonville Traction Co. v. Mining Co.*, 196 U. S., *supra*, that "the state may not prescribe any mode of taking private property for a public purpose which would exclude the jurisdiction of the Circuit Court of the United States." It was contended in the case that "the question of appropriation is one primarily and exclusively for the state to determine." Necessity and a public use must in all cases exist as a condition precedent to the legal right to appropriate (*Tracy v. Elizabethtown, etc., R. R. Co.*, 80 Ky., 259-265). In this case it was held:

"The company is not the judge of the necessity for the condemnation of the property or of the character of its use. The decision of both these questions belongs to the court."

In this case, 80 Ky., 259-265, the company took the prescribed mode of appropriation. The owner filed an answer denying "that the land and property sought to be condemned by the proceeding herein is necessary for said company in the construction or repair of said road."

While courts will not control or supervise the propriety or policy of the condemnation authorized by the Legislature, yet

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this uncontrolled power does not authorize the Legislature to "so determine that the use is public as to make the determination conclusive upon the courts. * * * The existence of the public use in any class of cases is a question to be determined by the courts." *Mills on Eminent Domain*, Section 10, and authorities there cited.

"It is fundamental in American jurisprudence that private property can not be taken by the government, national or state, except for purposes which are of a public character, although such taking be accompanied by compensation to the owner. This principle grows out of the essential nature of free governments." *Loan Association v. Topeka*, 20 Wall., 655; *Cole v. LaGrange*, 113 U. S., 1-6.

We therefore hold that the city of Lakewood, by ordinance No. 1005, is not seeking to take the property therein described for a public purpose, but that the purpose it has in view is really to take ten feet of land located on the east line of Warren road, and whatever expense or compensation may be paid therefor shall be borne by the tax-payers; and that at the same time its purpose and aim is to donate, in effect, a strip of land ten feet wide on the west side of Warren road running from Detroit street to West Madison avenue to itself and private property owners, and that therefore it is not seeking to appropriate this land for a public use.

We hold, secondly, that no necessity exists for the proposed appropriation; that Warren road is now sixty feet wide; that it was so admitted to be sixty feet wide by the village of Lakewood, the predecessor of the defendant city; and not only admitted, but declared by solemn resolution of its council to be sixty feet wide.

And we further find that the city of Lakewood, before it began these proceedings, appointed a committee, or directed its committee on streets to investigate the matter, and had full knowledge of all the facts and circumstances with respect to the conditions of Warren road and the encroachment thereon by itself and by property owners on that side of the road.

And we hold further, that it is not acting in good faith in the premises, and that it would be a misapplication of the public funds and a misuse of the power of the corporation to permit it to proceed as contemplated by said ordinance.

For these reasons the injunction prayed for will be granted and made perpetual.

In the case of Mars E. Wagar and other property owners, being No. 138,750, which was tried jointly with this case, the same entry will be made.

As Warren road is a county road, the board of county commissioners, early in 1914, entered into a contract to pave a portion of the road from Detroit street southerly beyond the city limits of Lakewood. The maps, profiles and specifications prepared by the county officials show that the easterly line of the paved strips the county intended to pave encroached upon the line of the road as fixed and established by the circuit court in the case of *Francis H. Wagar v. The Village of Lakewood et al.* The proposed pavement, if permitted to be laid in accordance with the terms of the contract, would not leave sufficient space for a sidewalk on the easterly side of Warren road without encroaching upon the lands of east side abutters. A property owner on the east side of the road brought an action in this court against the board of county commissioners to enjoin that body and its contractor from putting down or laying this pavement as contemplated by the contract. A temporary restraining order was allowed by this branch of the court, solely for the reason, and so announced from the bench, that the pavement would encroach upon the easterly line of Warren road as determined and fixed by said circuit court decree. Upon hearing afterwards had before another branch of the court, the restraining order was made perpetual for the same reason. This action or order of this court stands unreversed. No appeal was taken therefrom.

It would seem, under all the circumstances, that the question of the location of the easterly line of this road was *res judicata*. The city of Lakewood was acting in concert with the board of

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county commissioners so far as paving Warren road is concerned, and had full notice of all that was done in the premises.

I desire to say here that I am under many obligations to counsel on both sides for the very exhaustive and voluminous briefs filed and suggestions made.

If I have not followed the lines indicated by counsel for the plaintiff and defendant so far as the authorities cited by them are concerned, it is because I desired to pursue an independent line of inquiry, endeavoring as far as I could to be wholly uninfluenced by the arguments of counsel or citation of authorities presented by them.

**APPLICATION OF THE LICENSE STATUTE RELATING TO
CHattel LOANS.**

Common Pleas Court of Montgomery County.

CHARLES HOUSER v. STATE OF OHIO.

Decided, March, 1915.

Loans on Chattels and Wages—Application of the Statutory Requirement as to the Licensing of Lenders—Evasions which Constitute a Violation of the Statute—Section 6364-1.

The statutory provision that all persons, firms or corporations making loans upon chattels, salaries or wages must first obtain a license from the Secretary of State so to do, applies to all loans which, through intentionally deceptive words or acts on the part of the lender, are accepted by the borrower with the conviction and under the belief that his chattels or salary are answerable therefor.

Roy G. Fitzgerald, for plaintiff in error.

H. A. Estabrook and *Reuben R. Holmes*, contra.

SPRIGG, J.

This case is before the court upon error to a ruling of the criminal division of the municipal court of the city of Dayton, Ohio, in an effort to reverse the judgment and conviction of

Charles Houser, the plaintiff in error, for an alleged violation of Section 6346-1 of the General Code of Ohio laws.

The court has indulged in much careful research and granted this case considerable thought, not only because of its importance to the plaintiff in error and the public, but more especially since the arguments and briefs of counsel would seem to present at first blush a marked difference between the law of our state and the dictates of sound judgment and common sense, under the proofs as offered in municipal court.

The plaintiff in error, who was the defendant below, was charged with the violation of Section 6346-1 of the General Code of Ohio in that without a license he engaged in the business of making loans upon chattels or personal property. The law upon which this prosecution was based is to be found in Sections 6346-1 to 6346-7 inclusive, of the General Code of Ohio. Section 6346-1 reads as follows:

"No person, firm or corporation except banks and building and loan associations, shall engage or continue in the business of making loans upon chattels or personal property of any kind whatsoever, or of purchasing or making loans upon salaries or wage earnings, without first having obtained a license so to do from the Secretary of State."

Section 6346-6 provides that:

"Any person, firm or corporation or any agent, officer or employee thereof, violating any provision of this act, or that carries on the business of making loans upon chattels or personal property of any kind whatsoever, or of purchasing or making loans upon salaries or wage earnings, without first obtaining license as provided in this act, shall for the first offense be fined," etc.

The plaintiff in error contends that, "while it is admitted that a loan was made by him to one Mary Brown, in the amount claimed," said loan was not made upon "chattels or personal property, but was solely a moral risk and absolutely unsecured in any way or manner whatsoever."

At this point it might be stated by the court that the testimony below shows no mortgage or pledge upon either real or personal

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property to have been made between the parties. The evidence does show, however, that one Mary Brown, a citizen of Dayton, Ohio, having stored her household goods with a certain storage company in said municipality, was desirous of repossessing herself of the same, so that she might engage in the rooming house business; that being without funds, and therefore unable to release her property from storage, upon the advice of a friend, she repaired to the Dayton Credit Company in the city of Dayton, of which Charles Houser, the plaintiff in error, was the agent, and requested a loan of nineteen dollars so that she might release her goods from storage and obtain immediate possession of the same for her own use; that at the time the said Houser suggested to her that he could not loan her the sum of nineteen dollars, but would accommodate her with the sum of twenty dollars if she could satisfy him as to the kind, amount and condition of her possessions; that in pursuance thereof she agreed to borrow the sum of twenty dollars from the Dayton Credit Company through its agent, Charles Houser, and for that purpose gave to the latter a list of her furniture and household effects together with a statement of her domestic, social and financial condition; that thereafter the said Charles Houser, upon her information that she had purchased her household goods from William Byrne, a credit and installment house in the city of Dayton, telephoned the said William Byrne for the purpose of discovering the credit of said Mary Brown, and probably as to whether she had paid for the furniture in question; that thereupon certain statements were made to her in relation to her liability for the indebtedness about to be incurred, and to all intents and purposes she was led to believe that her household effects were to be security for the loan she sought. That in the final negotiation of said loan she signed two promissory notes, one being for the principal thereof, and the other ostensibly for interest and costs, and also a certain paper writing which, while it contained no list of her chattel property, was described to her as being a chattel mortgage and was in every way such, excepting that in small print it contained the provision that "Nothing herein contained shall be construed as to convey any title to the

property herein described to the said L. N. Clark or to the Dayton Credit Company, or to any person or persons represented by them, or to create any lien thereon in favor of the said L. N. Clark or in favor of the said Dayton Credit Company or in favor of any person or persons by them represented."

The loan was made and thereafter certain payments were had either upon the principal or the interest, although the same were not kept up in accordance with the terms; also several demands would seem to have been made either for punctual payment or the possession of the chattels alleged to have been mortgaged.

Then came the flood and the property of Mary Brown was swept away thereby, as was that of most other citizens of Dayton. Thereafter many claims were made upon her by the Dayton Credit Company through its agent and collectors and various importunities upon the said Mary Brown induced her to offer to turn over to said, the Dayton Credit Company, her range or cook stove, the only article which she had saved from the waters, in payment of the debt. This was refused, however, and payment insisted upon, and by reason of such insistence the case came into the court below.

The contention of counsel for the plaintiff in error is, that the loan in question was not made upon chattels or personal property, but merely upon a moral risk; that the section of the code, namely, 6346-1, upon which the state bases its affidavit, only applies to those persons who engage in the business of making loans upon chattels or personal property, and that no act of the General Assembly can be broader than its title, particularly if the same be penal and not remedial in its nature. In support of this proposition counsel for the plaintiff in error relies to a great extent upon the case of *State v. Myers*, 56 O. S., 740.

In that case our Supreme Court holds in effect that a statute defining a crime or offense can not be extended by construction to persons or things not within its descriptive terms, though they be within the reason and spirit of the statute; and further, that persons can not be made subject to such statute by implication, since only those transactions are included in them which are within both their spirit and letter, and all doubts in the

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interpretation of such statutes are to be resolved in favor of the accused.

This in general is undoubtedly the law, not only in the state of Ohio, but in most of our other jurisdictions as well. However, as times change and the ideas of the public change in due proportion, the courts are forced to take a wider and perhaps more intelligent view of the law, both common and statutory. This has been recognized by our own Supreme Court since the seemingly inexorable ruling in the Myers case.

In the case of *Baker v. State of Ohio*, 69 O. S., at page 68, particularly at page 74, Judge Spear says:

“We are quite aware that the rule of law and of this court is that a statute defining an offense is not to be extended by construction to persons not within its descriptive terms. Yet it is just as well settled that penal provisions are to be fairly construed according to the expressed legislative intent, and mere verbal nicety or forced construction is not to be resorted to in order to exonerate persons plainly within the terms of the statute.”

And to like effect, see the case of *Conrad v. State of Ohio*, 75 O. S., 52, in which the Supreme Court holds that the rule as to strict construction of the penal statutes does not require the courts to go to the extent of defeating the purpose of the statute by a severely technical application of the rule.

Also the case of *State v. Vance*, in the 84th Ohio State, at page 207, which absolutely affirms the proposition laid down in the foregoing cases.

In other words, while penal statutes are to be strictly construed in favor of the accused, and are not presumed to include persons or offenses which their titles would not seem to indicate, still the courts are not to go out of their way by vain construction or forced interpretation so as to preclude those persons or offenses from the operation of the statutes, which the Legislature in its wisdom and desire fully intended to include.

Counsel for plaintiff in error bases his contentions more especially upon *State v. Cotton*, reported in 123 La., at page 750, a case practically in point, and perhaps the only one which

either counsel or the court has been able to discover. In Louisiana there was a statute against loaning upon salaries. It was shown that the defendant loaned to wage earners, sometimes charging as high as 30 per cent. in a month. However, he took no assignment or pledge of the salaries of those to whom he made his loans. The court held that an act can not be broader than its title: in so far as it is, it is unconstitutional. The act in question was declared in its title to be for the purpose of levying a license on the business of lending money on or purchasing time, wages or salaries from wage earners. The license, therefore, was to be upon those who purchased time or lent money on wages and salaries. The court said:

“According to the contention of the state the phrase ‘lend money on wages or salaries’ has the same meaning as ‘lend money to wage or salary earners.’ We do not think so. To lend money on something means to lend money on the hypothecation of something. A money lender applied to for a loan on something (especially the kind of money lender which the State contends the defendant in this case is), would certainly understand the thing on which the loan was solicited would be placed in his hands as security for the loan. A loan on real estate, on bonds, means a loan on a mortgage upon the real estate, on a pledge of the bonds. Defendant’s business, therefore, does not come within the purview of said act.”

With due respect to the Supreme Court of Louisiana and counsel for plaintiff in error in this case, we can not agree with such reasoning. It is not to be thought that the legislative intent in the drafting of the statute before us, included only those who actually received chattel mortgages upon personal property and excluded those who by every word and deed strove to impress the mind of the borrower with the fact that the loan was made upon chattel security although in reality it was not. To so hold would be tantamount to saying that the evil which the Legislature sought to correct was the business of accepting chattel mortgages and not that of making loans to indigent persons at excessive rates of interest. To us this would be an absurdity. Such actions and conversations as were employed by the plaintiff

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iff in error in this case, would as effectually force the unlettered and untutored mind of the average borrower of the class under consideration to the conclusion, that a failure to pay the debt no matter how unconscionable the contract, would eventuate in the loss of his property as would the mere execution and delivery of a chattel mortgage. A chattel mortgage of itself is certainly sufficiently innocent, but loans of the class before us are not, whether secured by mortgage, ingenuousness or fear. It is our opinion that the Legislature intended to include all such loans which, through deceptive words or acts upon the part of the lender, are accepted by the borrower with the conviction and under the belief that his chattels are answerable therefor. Counsel would seem to feel that Judge Dillon, of Franklin county, in his decision in the case of *Thuma v. State of Ohio*, 15 N.P.(N. S.) at page 625, was not properly advised in the premises. We believe, however, that he was guided by sound judgment, good conscience, common sense, and the settled law of Ohio, when he said upon page 629 of that decision:

“And it is claimed upon the part of counsel for Bighamm that this loan was made, not upon theory of pledge or mortgage upon his personal property, but solely upon the credit and standing of the borrower and therefore was made purely upon a moral risk. I am sure that a court might close its eyes and ignore the real transaction, and by some strict and unnecessarily technical construction arrive at that conclusion; but a review of the transcript of the evidence in the case precludes any such conclusion herein. The conviction, therefore, is not for evading the law. Counsel are correct in the statement that there is no statute providing for a punishment for evading the law. It is the fact that they have transgressed this law in substance which is the basis of the court’s decision.”

This case was affirmed by our court of appeals without report.

And this we believe to be the gravamen of the case before us. It is idle to speak of the court’s having moral courage to face the rancor of public opinion when public opinion stands for that which is obviously and conscientiously correct. The

sole time a court need fear the urge of public clamor is when it desires to do that which is right in the face of a misguided public sentiment.

In the case before us there is no such situation. We are satisfied from having read the record, that every act of the plaintiff in error and of his principal was for the purpose of circumventing and evading those just statutory provisions which were passed by the Legislature for the protection of unfortunate and impoverished individuals who require financial assistance to the extent of submitting to almost any injustice in order to obtain the same. In doing so they certainly transgressed the law in substance.

We do not believe that this court, sitting either in equity or at law, in a supposed enlightened age of civilization, should allow the machinery of justice to be utilized for the purpose of its own defeat.

The ruling of the court below will, therefore, be sustained and judgment may be entered accordingly.

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Heimlich v. Printing Co.

GROWTH OF THE LAW TO FIT NEW CONDITIONS.

Common Pleas Court of Franklin County.

SAMUEL HEIMLICH v. THE DISPATCH PRINTING CO.; AND SAMUEL
HEIMLICH v. THE OHIO STATE JOURNAL CO.

Decided, January Term, 1915.

Constitutional Law—Validity of the New Law of Libel—Modifying the Rule as to Liability Without Regard to Moral Turpitude—Everything Filed in a Competent Court of Justice is Public Property and May be Examined, Discussed and Published—Sections 11342-3.

The present Ohio statutes relating to libel do not contravene any provision of either the state or federal Constitution, but are a proper exercise of legislative power; and a fair and impartial report of the filing and of the contents of an affidavit in a criminal action, pending at the time in a court of competent jurisdiction, is privileged and against such publication there is no remedy.

J. L. Stern, for plaintiff.

Bennett & Westfall, contra.

KINKEAD, J.

In the cause against the Dispatch Printing Company the following charges in libel are complained of by plaintiff, an attorney:

“As the result of the investigation made by W. D. Yaple, at Chillicothe, into the referendum petition filed from that place, a warrant was sworn out Monday evening for the arrest of Samuel Heimlich (meaning plaintiff), an attorney of Cleveland, which circulated petitions there, charging him (meaning the plaintiff) with perjury. The perjury consisted in swearing that the name of B. F. Butler on a petition that he (meaning plaintiff) filed was genuine. It (meaning petition) is declared by Butler to be a forgery.” (Meaning and intending thereby to mean that the plaintiff either forged the name of the said B. F. Butler or aided and assisted in causing the name of said B. F. Butler to be forged.)

A second cause of action charges the publication of the following false and defamatory matter on July 23, 1913:

"The Attorney-General's office, however, expects to file another warrant against Heimlich (meaning plaintiff) based on other evidence of alleged fraud in connection with the same law."

An allegation is made a part of this cause of action that it was meant to convey the impression that although the plaintiff was found to be not guilty of the crime of perjury, as intimated in the libelous article referred to in the foregoing first cause of action, yet the plaintiff was guilty of other crimes of "perjury," and had perpetrated other frauds, which crimes and frauds would and should subject the plaintiff to criminal prosecution and conviction.

A third cause of action charges the publication on August 2, 1913, of the following alleged defamatory matter, to-wit:

"McMillan is attorney for Samuel Heimlich (meaning plaintiff) of Cleveland who (meaning plaintiff) is now charged with perjury."

The defamatory matter complained of in the case against the *Ohio State Journal* is as follows:

"W. C. Archer, secretary of the state liability board of awards yesterday made affidavit to a warrant charging Samuel Heimlich (meaning plaintiff) with perjury in certifying the name of B. F. Butler of Chillicothe as genuine on a petition. The name is said to have been forged.

"A second affidavit, charging perjury, was filed at Columbus police headquarters yesterday against attorney Samuel Heimlich of Cleveland. He is charged by Edward Donavin Waverly, a deputy fire marshal, with having sworn that Harry Walker a drug clerk who signed a petition for a referendum on the workmen's compensation law was an elector. Walker it is said told Heimlich that he was not of age, but Heimlich insisted that he sign anyhow, as it would make no difference."

Damages in the sum of \$100,000 and \$75,000 are prayed for in the two cases respectively.

The answer of the defendant, the Dispatch Printing Company, avers in substance that each and all of the publications were made in good faith, without any information that the

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statements were not true, but with reasonable grounds for believing the same to be true; that defendant had no malice in the publication, and that plaintiff did not demand or request a retraction.

It is further averred that the publications were each and all a fair and impartial report of the contents of and the filing of an affidavit in a criminal action pending at the time in the police court, a court of competent jurisdiction, the affidavit having been sworn to by Wm. C. Archer before the police court clerk; that they were each and all privileged classes.

A demurrer is filed to the second defense of the answer. The answer by the Ohio State Journal Company avers:

"That each and all of said publications complained of were made in good faith, without any information that the statements contained therein were not true, etc.; that the said defendant had no malice whatsoever in the publication of the same and that said plaintiff did not demand or request a retraction thereof by the said defendant."

Defendant further says that:

"The publications and each of said publications * * * were publications of a fair and impartial report of the contents of and the filing of an affidavit in a criminal action, * * * then pending * * * in the police court of the city of Columbus, etc., said affidavit being sworn to by, etc., that said police court * * * was a court of competent jurisdiction, etc.; * * * that * * * said publications * * * were, and each of them are privileged publications," etc.

A general demurrer is filed to both answers.

The answer is filed under Section 11343-2, which provides that:

"The publication of a fair and impartial report of * * * the issuing of any warrant, the arrest of any person accused of crime, or the filing of any affidavit, pleading or other document in any criminal or civil cause in any court of competent jurisdiction or of a fair and impartial report of the contents thereof, shall be privileged, unless it be proved that the same was published maliciously, or that the defendant has refused or neglected to publish in the same manner in which the publication com-

plained of appeared, a reasonable written explanation or contradiction thereof by the plaintiff, or that the publisher has refused, upon request of the plaintiff, to publish the subsequent determination of such action."

The contention of the plaintiff is that the statute is unconstitutional, and hence the defense must fail; that the defamatory matter is *per se* libelous entitling plaintiff to compensatory and punitive damages. It is urged that under the rule adopted by *Cincinnati Gazette Co. v. Timberlake*, 10 O. S., 549, and *Byers v. Meridian Printing Co.*, 84 O. S., 549, the statute is invalid.

The doctrine of the *Timberlake* case is that the rule of privilege does not extend to preliminary proceedings of *ex parte* character such as the filing of an affidavit before a police magistrate for an arrest.

In *Byers v. Meridian Printing Co.*, *supra*, the doctrine of privilege of the *Timberlake* case was reaffirmed, and the statute, Section 5094, which provided that good faith through mistake in publication and failure to demand retraction shall rebut the presumption of malice from the publication, was held invalid.

The present statute is radically different from the former one. It constitutes a fair and impartial report such as is claimed in the answers an absolute privilege for which there can be no remedy.

The logic of the argument of counsel for plaintiff is, that the Supreme Court having held a statute providing that good faith and failure to retract upon demand, rebuts the presumption of malice, is invalid, because it takes away a substantial right as well as infringing upon the right of due process of law; *a fortiori*, a statute which constitutes a fair and impartial report of papers duly filed in court, a privilege, should also be held invalid.

It is also argued that this court would reverse the decision in *Byers v. Meridian Printing Co.*, if it holds this law valid.

The statute under consideration creates a privilege from liability which has not heretofore been recognized by judicial precedent. The privilege of the press heretofore has extended only

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to proceedings of action actually taken by courts, it having been held not to embrace the filing of an affidavit in an inferior court or the filing of a pleading.

The statute does not interfere with "due process" so far as its provisions apply to the right of one injured by an alleged libel to prosecute an action in court by "due course" for redress. This is what due process means, and this is all that is comprehended by the Constitution. It does prescribe a new rule of liability in cases where a newspaper in good faith, without malice, makes a fair and impartial report of papers filed in a court of competent jurisdiction. This legislation undertakes to deal with the moral and inherent rights of parties. Heretofore an absolute liability has been imposed upon the "press" without regard to the turpitude of the act of publication, damages being assessed though good faith be exercised in publishing matters of public record which are open to the world. An individual may be injured by a publication of papers filed in court for which the press is in no wise *morally* responsible. The right of free speech of the press under the Constitution, is correlative with the right of redress for injury to reputation; that is, both are guaranteed in general terms by the Constitution, which leaves it to the Legislature or judiciary to prescribe the rules of substantive law relating to the injury. The press has heretofore been unequally treated by imposing a liability without regard to the moral turpitude of its act. The preponderant public opinion and custom, aside from a very few judicial expressions, now is that everything filed in a court of competent jurisdiction is public property which may be examined, discussed and published. Especially does this view apply to the conditions in our commonwealth under the present Constitution which constitutes the people law-makers under the initiative and referendum, and to all that takes place in any of the public offices concerning or affecting this function of the people.

Therefore any public charge of criminality, though preliminary in character, concerning the mode of exercising this right, ought to be and is public property, which should, in public morals, be within the privilege of a newspaper for the knowledge

and information of the public pursuant to the right of the press recognized by the Constitution.

It is said that designing wicked persons under such a rule of immunity will file false and malicious charges with an avowed purpose to have it published by the press expressly to injure others. Occasionally, that might happen; it has happened recently as to all the judiciary of this country. But the fact that no adequate provision for a penalty has been made for such an act, furnishes no reason for denying a privilege extended by statute to those who act innocently, in good faith and without malice in publishing public news. The abuse of the right of free speech to be redressible at law should be measured by the same rules of good faith, or of innocence, and absence of evil or intentional wrong-doing, as are those applying to the person injured and his right to relief. Justice is impartial, not partial.

When our Constitution was adopted every citizen possessed the inherent right to life, liberty, reputation and property. But such right must be measured in its scope and extent, and should be exercised with due regard to equal rights of others. It is axiomatic that when one becomes a member of society, he necessarily yields some rights to others in the ordinary social intercourse. The basis of all actionable injury is a wrongful act.

A citizen has the right of enjoyment of his reputation, while the press has the right of free speech being responsible for its abuses. Both are entitled to due process of law for the redress of injuries, or for the *defense* of one's rights. The rights are equal in these respects. The rules of conduct and of liability must rest upon sound basis of morals, giving the one injured a remedy where the act causing the harm is morally wrong, and therefore legally wrong.

When our Constitution was adopted its general principles were grounded on those of the common law. It was not contemplated however that these were to be stationary, but it was expected and intended that there should be a normal, natural growth and development of sound principles governing social intercourse, social justice, so that the conflicting interests may be equitably adjusted with the least injury possible to either, and according to the nature of the wrong and the relative right.

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It was to be expected that the Legislature was to apply and extend the general provisions to new conditions as they arise in order to guard every right, and prevent every injury according to sound principles of morals and justice. Its judgment in matters of policy is supreme so long as it does not clearly infringe upon specific constitutional limitation or restriction.

No such privilege as the statute now prescribes had ever been decided to exist when the Constitution was adopted. The power to create such privilege is concededly with the Legislature, so long as it does not conflict with constitutional right. Fifty years ago such a privilege was held not to exist in the Timberlake case, *supra*. Following the reaffirmance of this doctrine in 1911, in the Byers case, the present law was expressly enacted to change the rule of these decisions.

It is said that the right to recover in an action for libel to reputation can not be abridged by statute. *McGee v. Baumgartner*, 121 Mich., 287; *Byers v. Meridian Ptg. Co.*, 84 O. S., 408.

The determination of the question involves the consideration of the following provisions of the Constitution of the state and federal government:

Article I, Section 15, Constitution of Ohio:

“Every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due process of law.”

U. S. Constitution, 14th Amendment:

“No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law.”

The ground of nullification of former Section 3094, Revised Statutes, was that by the settled principles of the common law, the publication of defamatory matter, which is false in fact and not privileged, is presumed to be malicious. that is, the plaintiff may recover without proving malice, the burden being upon defendant to disprove it; that this is substantive law, not

mere matter of procedure, which rules have always been regarded as primary and essential in the law of libel for protection of reputation. These rights, it is said, the Legislature did not give to the libeled person and the Legislature can not take them away; they are regarded as part of the "remedy by due course of law" of which the Constitution declares that no person shall be deprived.

In its final analysis, the correct interpretation of *Byers v. Meridian Ptg. Co.* must be that the common law having conferred upon the person libeled a right of action, it was abridged by the statute.

The rule always has been, that actual malice may be disproved by proof of good faith. The former statute extended the rule to rebut the legal malice which might on trial prevent any recovery. As the law stood before the statute, plaintiff was entitled to recover nominal damages in any event.

One point of the decision to which special attention is directed is the view expressed that the presumption of malice and burden of proof is part of the "remedy by due course of law," and therefore is within the inhibition of Section 16 of Article I, Ohio Constitution.

It may be remarked that the decisions touching the burden of proof are conflicting in cases where there is a presumption in favor of plaintiff. A view opposite to that of the *Byers* case was expressed in *Klunk v. Railway*, 74 O. S., 125, where it was held that a presumption establishing a *prima facie* case does not impose the burden on defendant of establishing that it was not negligent. In *Ginn v. Dolan*, 81 O. S., 121, the court changed the rule of burden of proof as to negotiable instruments, holding that notwithstanding the presumption of consideration from execution and delivery of a note, the burden of proof still remained on plaintiff, where the consideration was questioned.

It is to be observed that the universal rule of procedure has ever been that legal presumptions constituting a *prima facie* case are always subject to be rebutted by proof of good faith and proper conduct, by the overbalancing evidence of defendant. The rule has always been (until the decisions above referred to),

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that when plaintiff has a *prima facie* case the burden of disproving it is on defendant. Of course the weight of the evidence must always support plaintiff, or he will fail. But libel *per se* where the presumption establishes legal malice seems to have been in a class by itself. But there is no good reason why the presumption may not be rebutted such as other presumptions are rebutted.

But this is beside the question of the *remedy by due course of law*, as contemplated by Article I, Section 16, Constitution. Some definitions are given in 84 O. S., 421, of "due course of law." They are not sufficiently concrete.

Remedy by due course of law means that a party shall have a hearing in the regular course of administration; a party must have a trial according to some settled course of proceeding; the kind of procedure according to law, which is suitable and proper to the nature of the case and sanctioned by the established usages and customs of the courts; a course of legal proceedings according to these rules and principles which have been established by our jurisprudence for the protection and enforcement of private rights. 8 Cyc., 1080-1082.

Matter of procedure is always subject to change. Due course of law has relation to adjective law, and not to substantive right which has to do with "*injuria*," or injury.

The effect and the ground of the decision in the *Byers* case is best understood in the light of these suggestions as to procedure, and the effect of the former statute would be to enable a defendant by proof of good faith, or failure to demand retraction to rebut legal malice as well as malice in fact which in the end would prevent recovery. To create a privilege, as the statute now provides, does not at all abridge the remedy by due course of law, but instead confers a *right* upon one to the detriment of another by allowing good faith to rebut a presumption of malice. To cling to such an arbitrary fiction of law at the expense of logic and reason and of sound morals, is to invalidate a legislative enactment upon the sheerest kind of technicality which can only be repudiated by constitutional amendment.

We do not agree with the doctrine of *Park v. Free Press Co.*, 72 Mich., 560, 568, as quoted in 84 O. S., 420, because we think

there is no specific provision in our Constitution which forbids the Legislature to modify or change the right of action for libel.

To invalidate this statute we must conclude that somewhere in the *spirit* of the Constitution, though not in the letter, the right of one to complain of libel as it existed at common law before our Constitutions were adopted can not be taken away, or changed by the Legislature. Such a view ignores the fundamental principals of reason, justice and law.

A question arises whether the denial of a right of recovery for publishing defamatory matter contained in an affidavit filed in court, which is a fair and impartial report thereof, and which is done in good faith and without malice, is inhibited by the Constitution.

Is the Legislature in its action concerning a *remedy* for an *injury* limited to the rule of the common law? May it make material change in a right to recover damages for an *injury* to reputation by providing that the exercise of good faith and by innocent conduct there shall be no liability?

If the constitutional provision is to be construed in the common law sense, then the scholastic view of the meaning of *injury* is to be adopted. There can be no *remedy* under Article I, Section 16 of the Constitution, until there has been an *injury*. *Injury* and *remedy* denote two separate rights, one substantive, the other adjective. When an actionable injury may exist is to be determined by the common law, the rules of which may be changed so long as constitutional right be not violated.

There is no provision in the Constitution which will prevent the Legislature from modifying a common law right of action for libel by depriving a plaintiff of the right to sue, where the defendant is innocent of wrong-doing. There is no vested right in a "right of action" or in a "defense" unless specifically protected by the Constitution. See *Campbell v. Holt*, 115 U. S., 628.

Mr. Justice Waite has well stated that:

"A person has no property, no vested interest, in any rule of the common law. That is only one of the forms of municipal law, and is no more sacred than any other. Rights of property which have been created by the common law can not be taken away without due process; *but the law itself, as a rule of con-*

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duct, may be changed at the will, or even whim of the Legislature, unless prevented by constitutional limitations. Indeed the great office of statutes is to remedy defects in the common law as they are developed and to adapt it to the changes of time and circumstances. Munn v. Illinois, 94 U. S., 134.

Mr. Justice Matthews in *Hurtado v. California*, 110 U. S., 516, 530, remarked:

“This flexibility and capacity for growth and adaptation is the peculiar boast and excellence of the common law. * * * The Constitution * * * was ordained, * * * by descendants of Englishmen, who inherited the traditions of English law and history; but it was made for an undefined and expanding future. While we take just pride in the principles and institutions of the common law, we are not to forget that in lands where other systems * * * prevail, the ideas of civil justice are also not unknown. * * * Due process of law, in spite of the absolutism of continental governments is not alien to that code which survived the Roman empire as the foundation of modern civilization in Europe, and which has given us that fundamental maxim of distributive justice—*sum cuique tribuero*. There is nothing in Magna Charta, rightly construed as a broad charter of public right and law, which ought to exclude the best ideas of all systems and of every age; and as it was the characteristic principle of the common law to draw its inspiration from every fountain of justice, we are not to assume that the sources of its supply have been exhausted. On the contrary, we should expect that the new and varied experiences of our own situation and system will mould and shape it into new and not less useful forms.”

Mr. Justice Brewer, in *Brown v. New Jersey*, 175 U. S., 172, 175, said:

“The state is not tied down by any provision of the Federal Constitution to the practice and procedure which existed at the common law. Subject to the limitations * * * it may avail itself of the wisdom gathered by the experience of the century to make such changes as may be necessary.”

Mr. Justice Moody, in *Twining v. New Jersey*, 211 U. S., 77, 101, said:

"It does not follow, however, that a procedure settled in English law * * * and brought to this country and practiced by our ancestors, is an essential element of due process of law. If that were so the procedure of the first half of the seventeenth century would be fastened upon the American jurisprudence like a straight-jacket, only to be unloosed by constitutional amendment."

Applying these wholesome thoughts and principles to the question, we are clearly warranted in acting upon moral principles of liability and justice as they are embodied in this statute, and as the changed conditions, views and custom now clearly warrant, and we are justified in concluding that there is no constitutional impediment to prevent the passage of a law changing a common law rule concerning a right of action. As the Constitution in no wise undertakes to prescribe what shall in law constitute an injury, it lies, therefore, within the clear province and power of the Legislature to change a common law right. There seems to be no shadow of doubt that the Legislature may provide that good faith may be allowed to rebut the *prima facie* case of libel classified as libel *per se*, just as it might enact a law, that there shall no longer be a presumption that a note is founded upon a valuable consideration, placing the burden upon the plaintiff to prove consideration.

We are firmly of the opinion that any right of action or of defense may be modified by either judicial decision or by the Legislature if not within clear constitutional protection. The right of action for libel, where the act of defendant is innocent of wrong-doing, is nowhere guaranteed as a vested constitutional right. Previous consideration of Section 16 of Article I, has failed to take into account the distinction before adverted to, between *injury done to reputation*, and *remedy by due course of law*. The Legislature may change or modify either.

The statute does not contravene Section 1 of the Ohio Bill of Rights, nor Section 1 of the Fourteenth Amendment of the Federal Constitution. It is, in the judgment of the court, a proper exercise of legislative power and a constitutional enactment.

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The demurrer to the answer as to the first and second cause of action in cause No. 68027 against the *Ohio State Journal* is overruled. As to cause No. 68026 against the Dispatch Printing Co. it is overruled as to the first but sustained as to the second and third causes of action, the charges there made appearing not to have been with reference to an affidavit filed in court, and the defense not being specific as to these.

**PERFORMANCE TO THE "SATISFACTION" OF A
PARTICULAR PERSON.**

Common Pleas Court of Hamilton County.

FRANK J. RUTTERER V. FRANK B. STEWART, TRUSTEE.

Decided, December 3, 1914.

Contract of Employment—To Continue as Long as Work is Satisfactory—Discharge Must be Based on Reasonable Grounds—Ohio Rule Apparently Not in Harmony With That in Other States.

In view of the uncertainty in Ohio as to the test which shall be applied where agreements are to be performed to the satisfaction of a particular individual and he seeks to terminate the contract on the ground of dissatisfaction, a nisi prius court will follow the latest expression of the circuit courts, which requires that the dissatisfaction be reasonable and not arbitrary.

Stephens, Lincoln & Stephens, for the motion.

Dolle, Taylor & O'Donnell, contra.

MAY, J.

The principal ground of error urged is the refusal of the court to give the defendant's special charge to the effect that if Stewart was acting in good faith in saying that Rutterer's work was not satisfactory, and therefore discharged him, there could be no liability.

It is likewise urged that the court erred in its general charge in instructing the jury that Stewart would be justified only in

discharging Rutterer because of his dissatisfaction, if a reasonable person under similar circumstances would have been dissatisfied.

If the question were an open one in this circuit and state, the grounds of error alleged would be well taken.

Under the contract Rutterer was to be employed "as long as his work was satisfactory." Of course this meant "satisfactory" to Stewart.

The weight of authority outside of the state of Ohio is to the effect that the employer must act in good faith, honestly, without caprice or whim—not arbitrarily. See *Labatt Master and Servant*, 2d Edition, Sections 198 and 199 and cases there cited. The same author says, Vol. 1, page 630:

"The position taken in Ohio is that the dissatisfaction which will warrant a discharge must be a reasonable dissatisfaction and not an arbitrary one, and that the good faith of the master in claiming the services to be unsatisfactory will not render the discharge justifiable if the services as performed were such as ought to have been satisfactory to a reasonable employer." Citing *Lake Erie & W. R. R. v. Tierney*, (1905), 8 O.C.C.(N.S.), 521; affirmed without report, 75 Ohio St., 565.

"This decision" says the learned author, "is obviously opposed to the general current of authority."

Our own circuit court in *Highland Buggy Company v. Parker*, 5 C.C.(N.S.), 383, where a salesman was to promote the interests of the buggy company "all to its satisfaction," said at page 385:

"The dissatisfaction which would warrant the company in terminating the contract could not depend upon mere whim or caprice, but upon such facts as would warrant a *reasonable person* in the conclusion that the services of the salesman were not promoting either directly or indirectly the interests of his employer."

The language used by the Allen county circuit court in the Tierney case, and our circuit court in the Highland Buggy Company case is opposed to the earlier opinions of our own and other circuit courts.

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In *Crigler v. Blair*, 4 C. C., 324, Cox, J., speaking for Judges Smith, Swing and himself, held, that where there was to be an exchange of property provided a "satisfactory title and abstract be furnished," that the person to whom such title and abstract were to be furnished was the sole judge of the satisfactory character of the same.

And in *Karsner v. Union Central Life Insurance Company*, 12 C. C., 394, it was held:

"Where the contract between an insurance company and one of its agents for a fixed period of years, provides that whenever the amount of the new business done by the agent is in the opinion of its officers unremunerative, or when the business of the company is not conducted in a manner satisfactory to the officers they may cancel the contract, it is for the officers alone to decide if acting in good faith, when the condition arises for such cancellation."

Judge Price who wrote the opinion of the circuit court cites and quotes from the following cases: *Brown v. Foster*, 113 Mass., 136; *Gibson v. Canage*, 39 Mich., 49; *Zaleski v. Clark*, 44 Conn., 218; and yet, Judge Price concurred with Shauck, C. J., Crew, Summers, Spear and Davis, making a unanimous bench, in affirming the judgment of the Allen county circuit court in *Lake Shore & W. R. R. v. Tierney*, reported in 8 C.C.(N.S.), 521. See 75 Ohio St., 566. An examination of the railroad company's brief, at page 13, in that case shows that the cases quoted by Judge Price in his opinion in the circuit court (12 C. C., 394), were cited to the Supreme Court in the Tierney case.

But it is urged by counsel for the defendant that this court is not bound by an unreported case in the face of the decision of the Supreme Court in the chattel mortgage cases, *Barrett v. Hart*, 42 Ohio St., 41, where it was held that under a chattel mortgage providing that a mortgagee might take possession whenever he deemed himself in danger of losing his debt, he could do so if acting in good faith. It seems, however, that the Supreme Court has used language in later cases which throw some doubt upon this question of what test is to be applied where agreements are to be performed to the satisfaction of a particular person.

Leaving out of consideration the affirmance of the Tierney case by the court without report, what effect then is to be given to the language of the Supreme Court in *Ashley v. Henehan*, 56 Ohio St., 559, at page 570:

“He (plaintiff) might, however, as suggested above on an averment supported by evidence that the architect had fraudulently or unreasonably refused his certificate, recover by showing a substantial performance of the work as required by the contract.”

This opinion of the Supreme Court was followed and applied by the Lucas county circuit court in *Wicker v. Messinger*, 22 C. C., 715.

Inasmuch as there seems to be a conflict of opinion both in the Supreme Court and in the circuit courts, sitting as a nisi prius judge, I am of the opinion that I am bound to follow the latest expression of the circuit courts where the latter have been affirmed by the Supreme Court, though without report. As stated at the outset of this opinion, if this was an open question in this state I would have no hesitancy in following the earlier opinion of our circuit court, as well as the opinion of Judge Price in *Karsner v. Union Central Life Insurance Company*, *ubi supra*, and hold that when a contract is to be performed to the satisfaction of another the only test is whether such other person has acted in good faith in expressing his dissatisfaction.

The law of Ohio should not differ from the general current of authority elsewhere, but it is not for this court in the face of the decisions above set forth to reverse the appellate courts. If the appellate courts are to be reversed, they and they alone have the authority to do so.

For these reasons the motion for a new trial will be overruled.

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**CLAIM OF ADVERSE POSSESSION BY THE GRANTOR OF
THE PROPERTY CONVEYED.**

Common Pleas Court of Cuyahoga County.

**JOSEPH BASKIN AND ANNA BASKIN V. EVA ERION AND
JOHN ERION.***

Decided, December 26, 1914.

Title to a Way Claimed Through Adverse Possession—Based Upon an Undisclosed Intention on the Part of the Grantor—To Hold the Way as Against the Grantee and Her Successors in Title—Injunction Against Assertion of Title by Prescription.

1. While a person may acquire title by prescription as against his grantee, his intention to hold adversely to the grantee must be evidenced by some overt act which is sufficient to inform the grantee of such purpose.
2. The claim in the instant case that the term of the adverse possession began on the day of the delivery of the deed, is characterized by the court as repugnant to all sense of right, equity and justice; and the testimony affording but slight support for such a contention, the court refuses to find that the grantor had an undisclosed purpose in mind at the time he made the grant to at once and immediately begin to hold the property adverse to the grantee, and the assertion of a title so acquired is enjoined.

M. V. Emerman, for plaintiffs.

Laubacher & Kees, contra.

KENNEDY, J.

This is an action in which the plaintiffs are asking for a perpetual injunction against the defendants, and the manner in which their cause of action arises is briefly and in substance about as follows, as set out in plaintiff's petition:

Plaintiffs aver that on the 16th of February, 1889, Mr. Henry Schafer, then the sole owner of the premises herein described, executed and delivered to one Lucy Botsford a certain quit-claim

*Cause taken to the Court of Appeals and there dismissed.

deed, granting to the said Lucy Botsford, her heirs and assigns, "a perpetual right-of-way and easement to be used in common" in and to the premises described therein, which deed is on record. That Lucy Botsford, at the time of the delivery to her of this quit-claim deed, was the owner of certain premises next adjoining that of Henry Schafer. That the eastern extremity of said right-of-way and easement was coincident with the westerly line of said premises of Lucy Botsford, so that by virtue of said quit-claim deed a drive or alleyway ten feet in width was created over the land of Henry Schafer from Woodland avenue into the land and premises of Lucy Botsford. That on the 23d of January, 1893, Lucy Botsford conveyed said premises to one Clara Larwill, and, as a part of said conveyance and appurtenant thereto, executed and delivered to her a quit-claim deed granting to Clara Larwill, her heirs and assigns, a perpetual right and easement over the land of the said Henry Schafer, which easement is described as being over the same part and portion of Henry Schafer's land as the same is originally described in the deed from Schafer to Botsford. This quit-claim deed is also on record. That on the 30th of November, 1904, Clara Larwill conveyed to one George J. Eckert the said premises so received by her from Lucy Botsford, and, as part of said conveyance and appurtenant thereto, executed and delivered to Eckert a quit-claim deed granting and conveying to him the same easement already referred to. That on the 1st day of June, 1914, Eckert conveyed by warranty deed to the Baskins, plaintiffs herein, said property next adjoining that owned by Henry Schafer, and which property was conveyed by Botsford to Larwill and by her to Eckert. The deed from Eckert to plaintiffs is recorded in Cuyahoga county records. As part of said conveyance and appurtenant thereto, Eckert executed and delivered his quit-claim deed to these plaintiffs, conveying the same easement which he had acquired from his predecessor.

The plaintiffs say, in substance, that the said driveway has been open as such for a period longer than twenty-one years; that buildings have been erected upon the lands adjacent on all sides thereof and with reference thereto, so that there is now upon

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the said land a driveway ten feet in width, commencing at Woodland avenue, running north sixty feet and east eighty-five feet into the land of these plaintiffs. That the said drive or alleyway, known in part as Schafer's Court, has been in public use by the citizens of the vicinity ever since the same has been established; that a public school is situated thereon, with egress and ingress thereto and from, through that portion of said alleyway running north from Woodland avenue; that many homes have been erected adjacent and with reference to the said alleyway, and it is the only means of ingress and egress to same, and it has been so used by the tenants thereof for a long period of time. That the defendant Eva Erion is the widow of Henry Schafer, and the defendant John Erion is her husband. Eva Erion is the owner, as widow and heir of Henry Schafer, of the premises next adjoining that of the plaintiffs, and is also the owner of the other property surrounding said drive or alleyway, and said John Erion is her duly authorized agent in respect thereto.

The defendants have prevented these plaintiffs from exercising their said easement right, as aforesaid, by means of physical force, and have threatened and continued to threaten to prevent and deprive plaintiffs of the use of the said driveway, so that the same will be permanently closed and the ingress and egress over the same to and from plaintiffs premises will be materially and irreparably interfered with. That said defendants have erected and maintained a fence across the eastern extremity of said driveway so as to prevent plaintiffs' entrance into the rear of plaintiffs' premises, and they have within the past two weeks caused to be erected a fence across the southerly extremity of said drive or alleyway on Woodland avenue, thereby completely closing both extremities of said drive or alleyway on Woodland avenue, thereby completely closing both extremities of said drive or alleyway and depriving plaintiffs of the use thereof. That the permanent closing of said driveway will irreparably damage plaintiffs' premises, and the amount of damage can not be ascertained in law, for which plaintiffs have no adequate remedy. Wherefore plaintiffs pray that the defendants and each of them, and

their unknown agents or anyone claiming by, through or under them, be restrained and enjoined from interfering with plaintiffs in the use and enjoyment of their easement in said driveway, and for other equitable relief.

To this petition the defendants answer and admit the following averments: The execution and delivery of said quit-claim deed by Henry Schafer to Lucy Botsford. That John Erion is the husband of the defendant, Eva Erion, and that she was the widow of Henry Schafer until her marriage to said John Erion. That defendants have prevented plaintiffs from driving over the land described in the petition, and have erected a fence across the southerly extremity of the land incorrectly termed "a drive or alleyway" in plaintiffs' petition, and that they have erected a fence across the easterly extremity of the land described in plaintiffs' petition, and maintain the same. For further answer they deny each and every other averment in plaintiffs' petition.

For a second defense they say, in substance, that at the time of the execution and delivery of the deed from Henry Schafer to Lucy A. Botsford a fence about five feet high existed across the easterly end of the land described in plaintiffs' petition, which had then existed in the same place for many years, and which remained in place until about the year 1910, when the fence complained of in plaintiffs' petition was erected by defendants on the exact line and position of said old fence. That for more than twenty-five years last prior to the filing of the petition herein said Henry Schafer, in his lifetime, and these defendants since his death, have had the actual, open, sole, exclusive, continuous and adverse use and possession of the lands described in plaintiff's petition, adversely to plaintiffs and those under whom plaintiffs claim; and that during all said time those under whom plaintiffs claim abandoned said land and all claim and right thereto and to the use thereof by easement, right-of-way or otherwise; and that by reason of all said premises all rights of plaintiffs' predecessors in title, if any they ever had, in the lands described in said petition, and to any easement or other interest concerning the same, were extinguished and terminated long before the conveyance to plaintiffs named in the petition herein.

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To this answer the plaintiffs reply and admit that at the time of the execution and delivery of the deed from Henry Schafer to Lucy A. Botsford a fence existed across the easterly end of the land described in plaintiffs' petition, and they deny each and every allegation contained in the answer not expressly admitted in the reply.

Many important facts involved in this case are undisputed. There is no dispute but that on the 16th day of February, 1889, Mr. Henry Schafer was the owner of the parcel of land fronting on Woodland avenue. Upon this land were located two blocks fronting upon Woodland avenue and having an alleyway between them by which access was had to the rear of such parcel of land. There were also located on the same parcel of land two terraces, one behind each of said lots, with a strip of land about ten feet wide between them and the block in front. On the same day Lucy Botsford was the owner of a parcel of land lying just next east of the parcel owned by Henry Schafer, and on said day Henry Schafer made and delivered to Miss Botsford his deed, wherein and whereby he granted to her a right-of-way ten feet in width running down through this alleyway from Woodland avenue to the strip of land lying between the blocks in front and the terraces in the rear of his property, and then along this strip between the east lot and the east terrace to the boundary line between his property and the property of Miss Botsford. At the time this deed was made and delivered Miss Botsford was occupying her premises as a home, there being located on it a residence and barn. There was also a picket fence along the line between her property and the property of Henry Schafer. There is some dispute as to just what was done with this fence after Mr. Schafer delivered his deed to Miss Botsford. The defendants claim that that portion of this fence running from the Schafer block to the rear of said terrace remained where it was until it had rotted down to such an extent that there was only left a lower rail and base-board, and under the lower rail two or three posts. The plaintiffs' evidence tends to show that this particular portion of the fence was removed two or three years after Mr. Schafer's deed had been executed and delivered, and from that time on until four years prior to the commencement of this action access to the

Schafer land through this right-of-way was unobstructed, to the extent at least, that anyone desiring so to do could drive down this alleyway from Woodland avenue and across this ten-foot strip in the rear of the Schafer Block on and into the Schafer property.

I have no hesitation in saying that the weight of the evidence is with the plaintiffs in this case. Generally speaking, the witnesses of the defendant were persons who had no occasion to use this right-of-way, and their present memory of the condition of such fence is based upon such actual observation of the same as they made from time to time in going about upon the Schafer premises when other matters were or may have been on their minds, and the condition of that fence and the question whether or not such right-of-way was open or closed was not a matter of importance to them under the circumstances. Under such circumstances it is quite natural and to be expected that the witnesses would have a somewhat vague memory of a fence more or less worn out and dilapidated. The exact location of the fence would not be a matter of such importance as to impress this upon their memories; and a possible desire to help the party for whom they testified may have led them to add to such vague memory the further proposition that this old fence went clear up to the Schafer Block. The witnesses for the plaintiff, on the other hand, were persons who had occasion to use this right-of-way, and some of them at least were interested in the question of the existence of the fence and its being open for use.

Counsel for the defense have attacked the testimony of Mrs. Larwill very bitterly, but I am unwilling to believe and unable to believe that Mrs. Larwill was guilty of deliberate perjury. True she was nervous and somewhat unstrung, which condition may be attributable to her age and condition of health; but there is nothing in her manner, appearance or relation to the case upon which a charge of perjury can seriously be based. She is certainly a woman of average intelligence; her story was consistent, and it must be manifest that she had no possible interest in the outcome of this litigation and does not appear to be related, in business or otherwise, to any of the parties to the suit. She was naturally interested in the matter, having owned the property at

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one time, and therefore would naturally know and remember the facts in regard to the use of this right-of-way.

The testimony of Doctor Eckert was to me very plausible. The doctor seemed to be very careful and conscientious in what he said. He was not extreme in his statements at any point. He appeared to me to be a man who earnestly sought to tell the truth as he remembered it, without exaggeration; and it seems improbable that he could have repeatedly driven through this right-of-way into the Botsford premises during the period he was the owner of the same if any obstruction existed which would prevent the use of the same as a right-of-way. The very fact that he noticed no obstruction in such right-of-way makes conclusive the proposition that this parcel of land was sufficiently open to be used as a right-of-way. It is not an unusual thing at all that in the rear of a block such as the Shafer Block there should be located receptacles for ashes and garbage. A person driving over this right-of-way would not be interested in such receptacles, unless they were so situated as to seriously obstruct the right-of-way and render passage to said right-of-way either difficult or impossible. Doctor Eckert very naturally had no memory as to whether or not there were any obstructions of the kind enumerated in the rear of the Schafer Block; nor could he be expected to notice the gratings at the windows unless they were so situated as to interfere with the use of the right-of-way.

I might say the same as I have of Doctor Eckert in regard to the other witnesses for plaintiff who testified in regard to the use of this right-of-way; and in my opinion the evidence is overwhelmingly in favor of the plaintiffs in regard to this issue of fact as to the use of this driveway. But even if the evidence of the plaintiffs and the evidence of the defendants were of equal weight, the case, on the question of fact alone, would have to be decided in favor of the plaintiffs, because the burden of proof is upon the defendants to establish such obstruction and such use of the premises upon which this right-of-way was located as to show open, notorious possession of the same adverse to such right-of-way.

But even if it be admitted, for the purpose of argument, that the facts in regard to this fence and its continuance where it was

located, are as claimed by the defendants, still I believe the case should be decided in favor of the plaintiffs. The most that can be claimed for this evidence is, that there was a picket fence located on the line between the Schafer and Botsford properties at the time Schafer made and delivered his deed to Miss Botsford, and that this fence was permitted by both parties to remain undisturbed until it had rotted down so that nothing was left but the posts and the lower rail and base-board. If the fact that this fence was allowed to remain where it was ever constituted adverse possession, the question must necessarily arise, when did it commence to constitute such adverse possession? What act was done by Henry Schafer and those claiming under or through him to make the existence of this fence evidence of adverse possession? The only answer to this question must be the making of the deed by which Henry Schafer granted this right-of-way to Miss Botsford, for the reason that it was the only act in reference to this right-of-way done by him and those claiming through him up to and until about four years ago, when a new fence was constructed by the defendants at the end of this right-of-way. In other words, we are able to charge Mr. Henry Schafer with having in mind a purpose, which purpose he did not disclose to his grantee—a purpose at once and immediately to hold this property adverse to the right-of-way at the very instant when he granted the same and deeded it to Lucy A. Botsford, and that this purpose, arising in his mind and being in his mind but undisclosed, was sufficient to constitute adverse possession of the premises as against his grantee, the grantee being in ignorance of any such purpose.

The defendants in this action, tacitly at least, admit that the above is their claim by the fact that they figure the commencement of their term of adverse possession from the very date of the delivery of the deed. Such a proposition must be and is repugnant to every sense of right, equity and justice, and can not be the law. While a person may acquire title as against his grantee by adverse possession, his intention to hold the premises adverse to his grantee must be evidenced by some overt act sufficient to inform his grantee that he intends to hold the premises adversely. *P., Ft. W. & C. Ry. Co. v. City of Canton et al*, 10

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C. C., 414; *Lane v. Kennedy*, 13 O. S., 42, 46, 47; *C., H. & D. Ry. Co. v. Wachter*, 70 O. S., 113.

In the 10 C. C. the court say in the syllabus:

"The mere undisturbed possession of land by the grantor, after delivery of the deed, for any length of time, will not be considered adverse as against the grantee. Nothing but a clear unequivocal and notorious act on the part of the grantor that would at once advise the grantee of the purpose of the grantor to hold the land against the grantee, would bar the latter's right if continued for twenty-one years." 10 C. C., 414.

The court in 13 O. S. say:

"The fact of possession *per se*, is only an introductory fact to a link in the chain of title by possession, and will not simply of itself, however long continued, bar the right of entry of him who was seized, and, of course, creates no positive title in any case. The reason, in other words, is, that it may have been a permissive possession, which, in the language of the master of the rolls, in 2 Jac. & Walk. R., 1, however long it may, in point of fact, have endured, could never ripen into a title against anybody. To make such possession *adverse* there must have been an intention on the part of the person in possession to *claim title*, so manifested by his declarations or his acts, that a failure of the owner to prosecute within the time limited, raises a presumption of an extinguishment or a surrender of his claim." 13 O. S., 46, 47.

Defendants base their right entirely upon the maintenance of this old fence at one end of the right-of-way. In reference to such evidence of adverse possession, the circuit court of the sixth circuit say:

"A fence or enclosure is only one element of the evidence that is necessary to establish such possession as would finally ripen into what would be in effect a title. * * * The main question is not whether a fence is around or upon the premises, but under what circumstances was the fence built and maintained, and under what claim." *Reynolds v. Newton*, 14 C. C., 433.

By the deed from Mr. Schafer to Miss Botsford, she and her heirs and assigns are made co-tenants of this right-of-way, along with Mr. Schafer, his heirs and assigns; and it is well settled law that one co-tenant could not secure title as against the other co-

tenant by mere exclusive possession only. Judge Hunt, of the Superior Court of Cincinnati, states the law as follows:

"In order to constitute disseizin of the co-tenant, there must be some overt act of an unequivocal character to the denial and exclusion of the right of the other co-tenants in the common premises. The mere occupancy by one tenant of the common premises is no evidence of the ouster of the co-tenant." *Gould v. Franz*, 5 N. P., 205.

The Supreme Court states the law as follows:

"The statute of limitations does not run in favor of a tenant in common in the occupancy of the premises, against his co-tenant, until some overt act of an unequivocal character, clearly indicating an assertion of ownership of the entire premises to the exclusion of the right of a co-tenant." *Youngs v. Heffner*, 36 O. S., 232.

The defendants plead in their answer abandonment or such non-user as would permit the inference of abandonment; but there is absolutely no evidence in support of this proposition. The evidence, on the contrary, tends to show beyond a question that Miss Botsford and all those claiming under her have always intended to claim this right-of-way, and under the law abandonment is a matter of intention. *Garlick v. P. & W. Ry. Co.*, 67 O. S., 223; *Hatch v. C. & I. R. R. Co.*, 18 O. S., 92, 121. In the latter case the court say:

"But the question of abandonment or not, is a question of intention. *Junction Railroad Company v. Ruggles*, 7 Ohio St., 1." 18 O. S., 121.

The right-of-way granted by Mr. Schafer to Miss Botsford was not a right-of-way personal to herself, but evidently was intended as a right-of-way appurtenant and subservient to the premises which she owned next adjoining the premises owned by Mr. Schafer. This is evidenced by the fact that the right-of-way is granted to her, her heirs and assigns, that it starts from the public highway and terminates at the line of her land, and would be, as to her, a useless cul-de-sac unless it was intended to be granted for a right-of-way leading to and to be used in connection with the premises owned by Miss Botsford herself.

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In the case in the 23d O. S., cited by defendants' counsel, the charge of the court which was sustained by the Supreme Court was as follows:

"If the jury shall find from the evidence that at the date of the deed made by Lasley to Logue, marked 'A,' the said Alexander Logue, grantee therein, was not the owner in fee or otherwise of some real estate adjoining the farm through which said right-of-way is granted, or situate in the neighborhood so that said right of way may become appurtenant to the same, then the said deed conveys a right-of-way personal to himself alone—one which can not descend to his heirs, and one which he can not assign or release to another person, except such other person be the owner of the farm through which said way was granted." 23 O. S., 616.

In that case the grantee had no land to which the right-of-way could lead; but in this case the grantee had land to which the right-of-way did lead, and measured by the same rule as that laid down in the 23d Ohio State case, it would clearly show an intention to make such right-of-way appurtenant to the land of Miss Botsford to which said right-of-way ran.

Judge Hollister, of the Hamilton County Common Pleas Court, states the law as follows:

"Whether or not a right-of-way is in gross or appurtenant to the land depends not alone on the language of the instrument by which it is granted, but on the circumstances of its intended use, the situation of the land and the occasion which gave rise to the necessity for its existence." *Jones Fertilizing Co. v. C., C., & St. L. Ry. Co.*, 2 O. D., 511 (286).

The case of *Hooper v. Barnes*, 13 Cal., 636, is on all fours with the case at bar. In that case the Supreme Court of California held that the right-of-way was appurtenant to the land, and not a right-of-way in gross.

I have considered this case with a great deal of care; I have examined the authorities, and have studied the briefs that have been filed; and I am compelled, by the force of the evidence and by the law applicable to the facts proven, to hold that this right-of-way, this easement, can not be taken from the plaintiffs, and that they are clearly, by the great weight of the evidence and

under the law, entitled to the relief they ask. The prayer of the petition must be granted.

ASSIGNMENT OF WAGES STATUTE INVALID.

Common Pleas Court of Lucas County.

CLARA L. MCGUIGAN V. THE BROWN AUTOMATIC HOSE COUPLING
COMPANY.

Decided, March, 1915.

*Constitutional Law—Statute Requiring Payment of Wages Twice
Monthly—Invalid in Its Provision Relating to the Assignment of
Wages.*

The act providing for payment of wages at least twice in each calendar month (Section 12946-1-2) abridges the privileges of those to whom it is intended to apply by denying to them, in the provision against assignment of wages, the right to possess and enjoy their property, and is as to that provision unconstitutional and void.

MANTON, J.

This cause comes into this court on error to the city and justice court, where it was submitted on an agreed statement of facts, and it is submitted here under the petition in error and the said statement of facts.

It appears that plaintiff received from L. A. Foley an assignment in writing, dated March 2d, 1914, of his wages then earned and to be earned within one month from date of assignment, in the employ of defendant.

Plaintiff's assignor was then in defendant's employ and continued therein for more than a month, and earned \$30. At the time he made the assignment he was indebted to plaintiff in the sum of \$30 for board. Defendant, in the court below, presented the sole defense that the assignment was void under the act of March 25th, 1913 (103 O. L., 154), and that it was, therefore, not liable.

The act named is the one providing for semi-monthly payments of wages, and it contains the following provisions:

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“And no assignment of future wages, payable semi-monthly under these provisions shall be valid.”

It contains the further provision:

“Providing nothing herein contained shall be construed to interfere with the daily or weekly payment of wages.”

The defendant was complying with the act by making semi-monthly payments of wages to its employees.

Plaintiff contends that the act of March 25th, 1913, is unconstitutional and void, as in conflict with Section 1 of Article I of the Ohio Constitution and Section 1 of Article XIV (Fourteenth Amendment) of the Federal Constitution.

A few of the state courts, notably Massachusetts and Indiana, have sustained acts which have placed limitations on the right to assign future wages, but others, and the greater number, have denied the right of the Legislature to place any restrictions on this right. But no Legislature has gone as far as the Ohio General Assembly did in this act, declaring all such assignments void.

The Federal Supreme Court refused to hold a Massachusetts act in conflict with Section 1 of Article XIV of the Federal Constitution, which sought to regulate and restrict to some extent the right to assign future wages, saying in *Mutual Loan Company v. Martell*, 222 U. S., 225, that the states might, under their police power, and pursuant to a public policy looking to the welfare of wage earners, regulate and to some extent restrict the right. No doubt the state may place restrictions upon the right to possess and enjoy property guaranteed by Section 1 of Article I of Ohio Constitution, under its police power for the public welfare, but it can not utterly destroy such property, the existence of which is not in itself injurious to the public.

And that is what this act would do in some instances. If we take the case of the plaintiff's assignor; he has a job and the power and the ability to perform the work, but he has no other property. He goes to an inn-keeper and says, “I will assign my wages to be earned for my present keep (board and lodging).” The inn-keeper can not take the assignment under the law, and

the unfortunate wage-earner loses his job and ability to labor because this property is taken from him by this act.

But he was unfortunate only because he got employment with an employer who paid his workmen semi-monthly. If he had found employment with one who paid weekly, he could have assigned his wages for his keep and preserved his property.

The employer can, by his own act as to the time of payment of wages, either bring himself under the act, or exclude himself from its operation, in respect to the matter of assignment of wages.

A wage earner working for an employer who has weekly pay-days has unrestricted right to possess and enjoy property (his wages. One who works for an employer paying semi-monthly has his property rights taken from him. It may be readily seen that this act attempts to take property without due process of law, and to deprive a person of the right to possess and enjoy his property, and does not afford equal protection of the law, and attempts to abridge the privileges of citizens of the United States. Wherefore, it is void as to the provision relating to assignment of wages.

The judgment of the lower court in favor of the defendant is reversed and set aside, and said cause is set down for trial in this court according to law.

UNREASONABLE REQUIREMENT AS TO HOUSE DRAINAGE.

Common Pleas Court of Franklin County.

JOHN M. RICHARDS V. JOSEPH DAUBEN ET AL.

Decided, March, 1915.

Constitutional Law—Ordinance Relating to House Drains—Rendered Void by an Unreasonable Restriction as to the Use of Vitrified Pipe.

1. A municipal ordinance which requires that all house drains shall be of vitrified pipe or iron pipe, and if of vitrified pipe then encased in two inches of cement or grout, is unreasonable and void for the reason that vitrified pipe is less porous than cement and

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the cement sleeve would serve no useful purpose but would so increase the cost as to render the use of vitrified pipe prohibitive and create a monopoly in the use of iron pipe which the evidence shows to be less desirable.

2. Mandatory injunction is the proper procedure where a permit to lay a house drain of vitrified pipe has been refused.

E. G. Lloyd, for plaintiff.

H. L. Scarlett, contra.

ROGERS, J.

The action is one to require Joseph Dauben, chief inspector of buildings of Columbus, Ohio, and D. D. Lewis, chief inspector of plumbing, by mandatory injunction, to issue a permit to plaintiff for the construction of a house drain. It appears from the whole case that plaintiff, in the proposed construction of the house drain for which he seeks a permit, is willing to comply with the state building code, but refuses to comply with ordinance No. 23377, Section 47. This section declares, in substance, that "all house drains shall be of extra heavy cast iron pipes with leaded and caulked joints, or of vitrified pipe jointed with mortar * * * and completely encased in Portland concrete or grout, at least two inches thick," etc. Plaintiff refuses to encase the vitrified pipe, which he seeks to use in the drain, with cement or grout two inches thick, and his refusal is based on the ground that the ordinance requiring such encasement of the vitrified pipe is unreasonable and therefore void. Evidence in the form of affidavits has been offered on the question, and from the evidence adduced, it appears to me that the requirement that the vitrified pipe be encased with cement or grout is a useless requirement which serves no practical, sanitary or other good purpose, and makes the laying of house drains out of vitrified pipe almost prohibitive. Upon the whole, vitrified pipe is less liable to deteriorate in the ground than iron pipe, on account of rusting away and allowing the contents to percolate through the soil and into the air. From the evidence adduced I can see no practical merit in placing a sleeve two inches thick about vitrified pipe. The latter is less porous than the cement. Whatever gases will penetrate the pipe—a practical impossibility—will more readily penetrate the cement, by reason of its greater

porosity. It may be that with the cement encasement the joints would be made more secure against breaking apart and the escape of gas. Even this may be doubted. On the other hand, the liability of iron pipe to breaking up, and to allow the escape of the gases, etc., therefrom renders the objection to it no less serious than to the vitrified pipe.

I have come to the conclusion that the section of the ordinance which requires vitrified pipe to be encased in two inches of cement or grout serves no practical use, is a mere arbitrary requirement and does not conduce to the health or sanitary advantage of the inhabitants. Rather it conduces to a monopolization of house drain building by confining the construction of house drains to one material, to-wit, iron pipe, or to encased vitrified pipe which from a mechanical point of view on account of the expense makes it practically prohibitive in the construction of drains. The section, in my opinion, is an unreasonable requirement and is therefore void. The remedy in my opinion is by mandatory injunction and not by mandamus.

While there is no stipulation that the case was submitted upon its merits, using affidavits as the evidence instead of testimony taken at the trial, I came to that conclusion from some statements by counsel. If the hearing is merely for a preliminary injunction, I would be slow to grant the relief. However, if the affidavits are to be treated as evidence on final submission, I have no hesitancy in granting the decree as a final determination of the controversy, by ordering the permit issued. I will not do so, however, as a mere preliminary injunction. I will wait to hear from counsel before making the entry.

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DELAY IN OBJECTING TO THE METHOD OF SELECTING JURY.

Common Pleas Court of Franklin County.

WESLEY C. BATES v. STATE OF OHIO.

Decided, October Term, 1914.

Libel and Slander—Prosecution for—Review of the Proceedings—Trial Before a Jury Not Drawn from the Wheel Not Prejudicial to the Defendant, When—Exception to the Array Must be Taken Before the Jury is Impaneled—Privileged Matter—Failure to File Bill of Exceptions—Two Affidavits Pending at the Same Time—Section 11436.

1. The method of selecting jurors, in the absence of a challenge to the array, is not a part of the trial of the cause, and when no such timely challenge is made can not be complained of by the defendant, who is concerned only in having the jury made up of citizens from the vicinage.
2. Matter does not become privileged by reason of the fact that it is published before a court in an ex parte way or privately to the court, but not in a judicial proceeding.
3. The failure of the trial judge to file the bill of exceptions is not a matter of which advantage can be taken to the prejudice of the defendant in a criminal case; nor does the fact that the trial judge has appended his signature to the bill, and thereby certified that it is a true bill, require a reviewing court to close its eyes to the evident fact that it is a partial or mutilated document and proceed to make findings on questions arising on such bill.
4. It is not error to overrule a motion to dismiss a prosecution for libel on the ground that another affidavit is pending in the same court between the same parties upon the same complaint, nor is it error to require the state to elect between the affidavits.

Emmett Tompkins and W. C. Bates, for plaintiff.

M. R. Patterson and Franklin Rubrecht, contra.

BIGGER, J.

This is a petition in error, brought to reverse a judgment of the police court of this city. The petition in error charges that the court below committed numerous errors, but upon the hear-

ing of the petition in this court only two questions were argued and relied upon to secure a reversal of the judgment below. These are, that the court below erred to the prejudice of the defendant by impaneling a jury which was not selected and drawn from the wheel in accordance with provisions of the statute, and that the court erred in overruling a demurrer of the defendant to the affidavi upon which the prosecution was founded.

And first, as to the alleged error in impaneling a jury which was not drawn in accordance with the provisions of the statute. It does not appear from the record that any objection was made upon the trial to the array of jurors from which a jury was selected to try the defendant. The journal entry upon the subject of the impaneling of the jury is as follows:

“This day this cause came on for hearing, and the defendant being present in open court, and the defendant having heretofore demanded a trial by jury, and the following jurors were impaneled and sworn.”

Now it is first to be noticed that there is nothing upon the record to show how the jurors were drawn or selected, nor would we expect to find that upon the record of the proceedings upon the trial. It is true that the Supreme Court of this state held in the case of *Palmer v. State*, 42 Ohio State, 596, that the impaneling of a jury is embraced in the trial of a cause. There is, however, a difference between drawing a jury and impaneling a jury. A jury is impaneled in open court upon the trial, and the proceedings take place in open court, but the drawing of jurors is not required by law to be made in open court and does not take place in open court. The selection and drawing of jurors takes place before and preliminary to the trial of a cause, and the method by which the jurors are selected and drawn is not a part of the trial and could not, in the nature of things, appear in the record of the proceedings upon the trial, except where there is a challenge to the array, in which case it may, by evidence, be brought upon the record. While it was held in the case of *Palmer v. State*, *supra*, that the impaneling of the jury was embraced in the trial of a cause, it was never held that

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the selection and drawing of jurors was a part of the trial of a cause, where the question is not raised by challenge to the array on the ground that the jurors were not selected and drawn according to law. In the case of *State v. Barlow*, 70 Ohio State, 363, the Supreme Court decided that:

“The manner of selecting or drawing jurors concerns the public rather than the parties in a cause. The statutory provision therefore relates neither to the right of a party as to the merits nor to the remedy for the vindiction of that right within the meaning of Section 79, R. S.”

In the opinion reference is made at page 377 to the case of *Palmer v. State*, *supra*, where it is said:

“*Palmer v. State*, 42 Ohio State, 596, and *Cincinnati v. Davis*, 58 Ohio State, 225, are cited as sustaining the judgment of reversal. The question in the *Palmer* case arose on the impaneling of the jury and involved the competency of individual jurors. Nobody doubts that a party who is to be tried by a jury is entitled to a fair and impartial jury of good and lawful men.”

So far as the record shows, and in the absence of a challenge to the array, it can not appear and does not appear but that the jurors may have been drawn from the jury wheel of the county as defendant's counsel claims it should have been drawn. The record of the trial could not show proceedings which did not take place in open court at the trial. There is no means by which such matters could be brought upon the record except by challenging the array and thus bringing it to the attention of the court and calling upon the court for a ruling which, if adverse to the defendant's contention, could be taken advantage of by an exception to the ruling and prosecuting error to the ruling. The defendant was entitled to a trial by a jury of good and lawful men, and the court has no doubt that if objection had been made in time he would have been entitled to a trial by jurors selected and drawn in accordance with the statute upon the subject, but it seems to be settled that if the defendant desires to challenge the array, it must be done before the jury is impaneled and sworn, and that after the jury is impaneled and sworn and the trial had, that it is too late to raise objections to the manner

of selecting and drawing jurors. The statute of this state, Section 11436, General Code, provides how objections may be made to the array. It is provided that:

"A challenge to the array may be made and the whole array set aside by the court when the jury, grand or petit, was not selected, drawn or summoned, or when the officer who executed the venire did not proceed as prescribed by law. But no challenge to the array shall be made, or the whole array set aside by the court by reason of the misnomer of a juror or jurors, but on challenge a juror or jurors may be set aside by reason of a misnomer in his or their names, but such challenge shall only be made before the jury is impaneled and sworn, and no indictment shall be quashed or verdict set aside for any such irregularity or misnomer if the jurors who formed the same presented the requisite qualifications to act as jurors."

It seems entirely clear that this is the only method by which a defendant can take advantage of irregularities in the selection and drawing of jurors, and it has been so decided in this state (*Forsythe v. State*, 6 Ohio, 19; *Ickes v. State*, 16 Circuit Court, 31). The syllabus in the last case is "challenge to the array after the impaneling of the jury has been begun, comes too late." It appears from the statement of the case that the array in that case was challenged after a single juror had been challenged for cause, and it was held to be too late. That this is the general rule in other jurisdictions, see 17th American & English Encyclopedia of Law, 1113, and cases cited; 24 Cyc., 330, and cases cited. If the array had been challenged it may be that such challenge should have been sustained, but unless it affirmatively appears that the rights of the defendant were impaired, the authorities are clear that irregularities in the selection and drawing of jurors can not be taken advantage of after trial. The only interest of the defendant was that he should be tried by good and lawful men having the qualifications of jurors. The affidavit charging the offense, charged the offense to have been committed within the city of Columbus, and if it be assumed (although the record does not show it and could not, in the absence of a timely challenge so that the court might pass upon it), that the jurors were selected and drawn by a jury

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commission appointed for the city and from residents of the city, how could this be prejudicial to the defendant, if they had the qualifications of jurors. As was said by Judge Shauck in the case of *State v. Fendrick*, 77 Ohio State, 298, if they had been drawn from the wheel at the court house the same jurors might have been drawn and impaneled, as the great bulk of the jurors in the wheel in the court house come from the city, and he further says that whether they were drawn from the larger or more restricted district, their qualifications would necessarily be the same.

Whether they were drawn from the wheel at the court house, or from the city's jury wheel, they were jurors from the vicinage of the alleged offense, and the same objections were open to the defendant to their qualification as would have been open to him if they had been drawn from the entire body of the electorate of the county. Our Supreme Court has more than once announced the principle that the selection and drawing of jurors is a matter which more especially affects and concerns the public than the parties. The defendant was concerned in having a jury of citizens from the vicinage of the alleged offense who possessed the qualifications of jurors, and if he had been tried by a jury thus selected, the manner of their selection in the absence of a timely challenge can not be complained of. The court concludes, therefore, that the record discloses no error in this respect, and that it could not so disclose any error unless there had been a challenge to the array. Some claim has been made that this affected the jurisdiction of the court. But this is not a jurisdictional question. The court had jurisdiction of the subject-matter, that is, of the offense charged in the affidavit, and it had jurisdiction of the person of the defendant for he appeared and defended against the charge. I find no authority to support the contention of the defendant in this regard and none has been cited.

In the case of *Hulse v. State*, 35 Ohio State, 421, the array was challenged. The same is true in the case of *McGill v. State*, 34 Ohio State, 237. *Cantwell v. State*, 18 Ohio State, 477, is not in point upon the question here involved. *Whitehead v. State*

decides that parties may waive the statutory right of trial by a struck jury, but in that case demand was made for it and the court held that it did not appear they were too late in making it.

The court did not commit any error upon this question because it was never presented to the court for its decision.

The next question is that the affidavit was demurrable or did not state an offense. This contention is founded upon the claim that the matter alleged to be libelous was absolutely privileged. But it seems clear that this view can not be sustained. The complaint which was published was not a judicial proceeding. It was purely *ex parte* and nothing more than a complaint such as any individual might make privately to this court. There is no provision of law for a judicial hearing of such a complaint. The range of absolutely privileged communications is very limited. The law upon this subject seems to be settled in this state by the decision of the Supreme Court in the case of *Cincinnati Gazette Company v. Timberlake*, 10 Ohio State, 548.

It is also alleged in the petition that the court erred in overruling the motion of plaintiff in error to dismiss the action because another affidavit was pending in said court between the same parties upon the same complaint. And also that there was error in requiring the plaintiff in error to go to trial while another affidavit was pending and undisposed of between the same parties, upon the same ground, and that the court erred in permitting the state to elect to go to trial upon the affidavit filed on March 21 while another filed on March 14 was pending and undisposed of. But the pendency of another affidavit was not ground for dismissing the action, nor was there any error in requiring the state to elect between the affidavits. See *Wilson's Ohio Criminal Code*, 9th edition, page 692. This is in accordance with the statute of the state, Section 13578, General Code.

The other errors alleged are such as arise upon a bill of exceptions. In this case it appears from the transcript that a bill of exceptions was presented to the judge of the police court, and that the judge found the same to be correct, and allowed and signed the same, but it does not appear that it was filed as re-

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quired by the statute. This, however, I am satisfied is a matter which in itself can not be allowed to prejudice the rights of defendant. This is made the duty of the judge of that court by statute, and the failure on his part to file it, is not a matter of which advantage can be taken to the prejudice of the defendant. The judge of that court has transmitted to this court a bundle of loose sheets, without any binding. The exhibits are sent under a separate cover, not attached to the bill of exceptions. Upon what seems to be the last sheet appears the signature of the judge. Upon an examination of this bundle of typewritten pages, it is evident that it contains evidence taken upon the trial of the defendant in the court below, and it is equally evident that there is a considerable portion of it missing. This being true, it appears from the bill itself that it is not a true and complete bill of exceptions, notwithstanding the certificate of the trial judge. At one point in the transcript of the evidence one entire session of the court is omitted, it appearing that the court adjourned at noon until 1:30 o'clock, and the entire record of that session is missing. At many other points it is apparent that considerable portions are missing and this is admitted to be true by both parties. Unquestionably the signature of the trial judge that a bill of exceptions is a true bill can not require a court to close its eyes to the evident fact that it is only a partial or mutilated document. If between the time of the signing of a bill of exceptions and its transmission to the reviewing court, it should be evident from the bill itself that it has been mutilated, certainly the court is not bound to overlook this evident fact because of the certificate of the judge. Clearly, therefore, this court is not in a position to review and pass upon the sufficiency of the evidence in this case, nor upon the rulings on evidence upon the trial. No argument has been made in support of the claim made in the petition that errors occurred in the rulings of the court, nor have any alleged errors been pointed out. While it is doubtless true that it is the certificate of the trial judge which gives verity to a bill of exceptions and the court can not hear any evidence upon this subject, yet it is agreed by both parties in open court that this alleged bill of exceptions was pre-

sented to the trial judge in its present unbound form and upon the last day of the ten days allowed to the trial judge to settle and sign the same; that what he did was simply to sign his name to a detached sheet to a certificate stating that it was a true bill of exceptions, and that this mass of typewritten sheets was then taken away by the stenographer instead of being filed in court, and for the purpose as stated to the trial judge of being bound. It next appears in court, having been transmitted to this court by the trial judge, in the form in which it now exists. Under this state of affairs, as to the bill of exceptions the court is of opinion that it can not make any findings upon questions arising on the bill of exceptions, where the bill does not present the entire record of what took place upon the trial, even if there might be some errors apparent in the portion of the record before the court, although none have been called to the court's attention. They might have been corrected or eliminated at other points where the record is missing because even if a court may fall into error, it may correct such errors ordinarily afterward, before the case is submitted to the jury.

The court has carefully gone over the charge of the court below to the jury and it seems to correctly state the law in such a case, and no argument has been directed against it and no specific complaint is made of it in the petition in error, although there is a general complaint that the court erred in many other respects. But courts do not search for errors not affecting jurisdiction where they are not assigned or pointed out. After careful consideration of the questions presented, the court finds no prejudicial error and the judgment of the court below must be affirmed and the petition in error dismissed at costs of the plaintiff in error.

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LATERAL SUPPORT TAKEN BY A STREET IMPROVEMENT.

Superior Court of Cincinnati.

**MARGARET ORR V. CITY OF CINCINNATI AND THE KIRCHNER
CONSTRUCTION COMPANY.**

Decided, December, 1914.

*Lateral Support—Interference With Right of, by Excavation for a
Street Improvement—Abutting Owner Entitled to Compensation—
But Improvement Can Not be Enjoined Until Compensation is
Made—Section 3829.*

1. Where a proposed street improvement will require such a cut or excavation along the property of an abutting owner as to interfere with the right to lateral support, there would a taking of property within the meaning of the Constitution, for which the owner would be entitled to compensation.
2. A municipality, however, is not required to first make compensation to the owner in such a case before proceeding with the street improvement, but may proceed with the improvement and make compensation thereafter; an injunction, therefore, will not lie to prevent a municipality from proceeding with such improvement.
3. Where such abutting property owner has been served with notice of the proposed improvement, and has filed his claim for damages within the prescribed time, it becomes the duty of the municipality, when it decides to proceed with the improvement, to determine whether or not such claim shall be inquired into before or after the improvement is made, and a failure to act in this respect should be considered a determination by the municipality to have the claim inquired into after the improvement is completed in accordance with the provisions of Section 3829 of the General Code.
4. A property-owner who has duly filed his claim for such damages is entitled to have his claim judicially inquired into and is not obliged to file a separate or independent suit against the city to recover such damages.

Heisel & Orr, for plaintiff.

Oliver S. Bryant, for City of Cincinnati.

Dinsmore & Shohl, for the Kirchner Construction Co.

SUTPHIN, J.

This is a suit for an injunction to restrain the defendants from proceeding with the improvement of Laclede avenue in Price Hill, in the city of Cincinnati. The material facts were agreed to by counsel and supplemented by evidence introduced by the plaintiff, and were as follows:

The plaintiff owns property at the southeast corner of Ross avenue and Laclede avenue in this city, upon which there is a dwelling-house. The lot of land fronts thirty feet on Ross avenue and extends back one hundred and twenty feet on Laclede avenue. The house is situated ten feet back from Ross avenue and extends back to a point fifty feet from Ross avenue, the north wall of which is within one foot from the south line of Laclede avenue. Plaintiff purchased the lot in question in 1889, and in the following year constructed her house thereon. The house was constructed in accordance with the grade of Ross avenue, which had been established in 1876, though not improved until some seven years after the house was built. At the time the house was built there was no established grade for Laclede avenue, though one was established three years later and subsequently re-established in 1913. According to the existing and natural level of Laclede avenue, there is a slope downward to the east from Ross avenue, and there is a material hump or knoll on that part of the street abutting plaintiff's property. The improvement of Laclede avenue to the established grade would require a lowering of the street from its natural level, so as to leave a cut or excavation along the north side of plaintiff's property, varying in height from nothing at Ross avenue to four feet four inches at a point opposite the rear end of plaintiff's house to five feet four inches along the plaintiff's back yard, and it is claimed that this improvement would deprive plaintiff of her right to lateral support, thereby leaving her lot and building walls unprotected and exposed, and in danger of being precipitated onto Laclede avenue.

A resolution declaring the necessity of improving Laclede avenue was passed by council of the city of Cincinnati, January 28, 1913, and notice of the passage of such resolution was served

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on the plaintiff March 15, 1913. Within two weeks thereafter plaintiff filed a claim, in writing, with the clerk of council for twenty-five hundred dollars damages. On June 28, 1913, council passed a resolution determining to proceed with the proposed improvement. This resolution, however, was silent as to whether claims filed for damages should be judicially inquired into before commencing or after the completion of the proposed improvement. This resolution was duly advertised, and the contract was in due time awarded the Kirchner Construction Company, one of the defendants herein. The improvement in question was started about three weeks before the filing of the petition in this case, and the contractors had progressed with their excavation and work until they were just up to plaintiff's property, when this application for injunction was made to restrain the contractors and the city from proceeding any further.

As above stated, plaintiff claims that this improvement will result in a taking of her property in so far as it will deprive her of the right to lateral support by removal of that part of the land in the street which immediately adjoins her property, and that she has a constitutional right to receive compensation for what will be taken before the improvement is made, in accordance with the provisions of Sections 3677 *et seq.* of the General Code. Plaintiff claims that this right is independent of any right which she might have for damages incident to a change of grade.

Now, it is clearly established in this state that the right of lateral support is not a mere easement, but is part of the owner's property in the land. It is a right of property which attaches to the soil and passes with it, and such right exists against municipal corporations as well as individuals. *Joyce v. Barron*, 67 O. S., 264.

For the purpose of this case, it is not necessary to determine to just what extent plaintiff would be deprived of lateral support for her land by this proposed improvement. The important question is, whether her property right may be taken for the purpose of making this improvement without first mak-

ing compensation therefor. The evidence in this case shows that no compensation has been made to the plaintiff. If she had a right to receive it in advance, then this threatened interference with her property right would entitle her to an injunction.

Article I, Section 19, of the Constitution of Ohio provides:

"Private property shall ever be held inviolate, but subsevient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; such compensation shall be assessed by a jury, without deduction for benefits to any property of the owners."

It will be observed that the right to take private property for the purpose of making and repairing roads is one that can not be exercised except for a public use, and then only when such roads are open for the free use of the public. The framers of our Constitution considered this object of such importance as to mention it in connection with that inherent right of sovereignty to seize property in time of war. It is to be particularly noted that while the person whose property is taken for such purpose is entitled to compensation, yet it is not provided that compensation shall first be made, which omission is in marked contrast to the requirement that such compensation shall first be made in all other cases where private property is taken for public use. What is said with reference to a road would apply with equal force to a street in a municipality which is open to the free use of the public, as is the street in question. Our Supreme Court has on several occasions recognized that private property may be taken for this purpose without first making compensation therefor. *Hixon v. Burson*, 54 O. S., 470, 483; *Toledo v. Preston*, 50 O. S., 361, 366; *Joyce v. Barron*, 67 O. S., 264.

It is clear therefore that no constitutional right will be invaded by permitting this improvement to be completed before

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compensation is made. In fact, it can be readily conceived that in a majority of cases, especially where there has been an excavation, it would be impossible to ascertain definitely the extent of the injury or damage to a person's property until it had been completed. The Supreme Court of Ohio, in considering the constitutionality of Section 2316 of the Revised Statutes, a part of which is generally the same as Section 3824 of the General Code hereinafter quoted, recognized this in holding that compensation could be made in such cases after the improvement had been completed. See *Toledo v. Preston*, above cited, where at page 367 Judge Bradbury said:

"The statute under consideration, however, only contemplates a delay until the injury shall be fully accomplished; for until the improvement has been completed, it is perhaps always impracticable to ascertain with certainty the extent of the injury, *the fill or excavation*, as the case may be, will cause; in fact the injury has not been completed until then; and a delay of the proceedings until that time, we do not think, necessarily conflicts with that provision of the Constitution, before quoted, which provides that the administration of justice shall neither be denied nor delayed."

The next question then is whether or not the plaintiff has an adequate remedy at law. When a municipality considers it necessary to make a street improvement, it first prepares plans, specifications, estimates and profiles showing the proposed grade of the street after completion with reference to the property abutting thereon. Council then passes a resolution of necessity, which contains the essential facts with reference to same, and serves notice upon property owners so that they may come in and examine plans, etc., and determine whether or not any damages will be suffered by reason of such improvement. If the property owner considers that he will be damaged, then he must file his claim within two weeks after the service of the notice. The purpose of this is to enable the city to determine whether it is practical from a business standpoint to proceed with the improvement. The duty of the city at this stage is best described in the language of the statute, Section 3824 of the General Code, which reads as follows:

"At the expiration of the time limited for so filing claims for damages, the council *shall* determine whether it will proceed with the proposed improvement or not, and whether the claims for damages so filed shall be judicially inquired into, as hereinafter provided, before commencing, or after the completion of the proposed improvement."

. If council decides to proceed with the improvement, an ordinance to that effect must be passed.

The city can not disregard claims for damages which have been filed, but it must determine, coincident with its determination to proceed with the improvement, whether these claims for damages shall be inquired into before or after the improvement is made. The fact that no such determination is made can not relieve the city of its obligation to do so: at most, its failure to decide must be considered as a determination to have claims for damages inquired into after the proposed improvement is completed. Such judicial inquiry must be made within ten days after the completion of such improvement by written application and trial by jury in the common pleas or probate court of the county. (Section 3829, General Code.)

Plaintiff filed her claim for damages within the time and would therefore be entitled to have the same judicially inquired into and determined at the time and in the manner above set forth; this remedy is open to her as a matter of right and it should not be necessary for her to institute a separate action at law for damages.

Counsel for the city, however, contends that the city is not obliged to act upon this claim for damages which was filed, and that if plaintiff has any claim which she wishes to assert, her remedy is to proceed in an action at law for damages. Of course there can be no question but that if the city fails to make application for this judicial inquiry, the plaintiff would have a right to proceed against the city by an independent suit. But the important point is that a person who has filed her claim for damages as above described is not obliged to file a separate suit. If the city fails to make application to the court within ten days after the completion of such improvement it fails to perform a statutory duty imposed upon it, which its

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proper officers could doubtless be compelled to perform by a mandamus proceeding. This duty has been clearly recognized by the Supreme Court of Ohio in the case of *Joyce v. Barron*, 67 O. S., 264, where on page 274, Judge Spear said:

“But it is said that she might have proceeded herself, by an independent suit, to recover her damages. This proposition is without merit. She did not have to. No such duty devolved upon her. The city had taken her property, and it was incumbent upon it to so conduct its improvement proceeding as to result in an ascertainment of her damages, or an adjudication that none had been sustained, in the proper forum, and this, to be commenced, in the language of the statute itself, if not sooner, at least ‘within ten days after the completion of such improvement.’ ”

In that case the street in front of a considerable portion of the plaintiff's property had been cut down so that her property stood ten feet above the street level. The court laid particular stress upon this right of the owner of property to have his damages promptly determined and paid, so that the owner in turn would have the money to meet any assessment levied for the improvement. This conclusion of the court finds support in Section 3911 of the General Code, which is the last section in the chapter which contains the sections hereinabove quoted. This section enjoins a strict construction, “in favor of the owner of the property assessed or injured, as to the limitations on assessment of private property, and *compensation for damages sustained.*”

In so far as plaintiff's claim for damages might include the interference with her right to lateral support, we are convinced that she would have an adequate remedy at law. The unquestioned law of this state is that any injury to a person's soil resulting from the removal of the natural support to which it is entitled, by means of excavation of an adjoining tract, gives to the owner a legal remedy in an action at law against the party by whom the work has been done and the mischief thereby occasioned. This right of action does not depend upon negligence or unskillfulness, but upon the violation of a right of property which has been invaded. Where, however, the injury

is to buildings which have been constructed upon the land, the owner has a legal remedy in an action at law only when he can prove that there has been some positive act of negligence on the part of those making the excavation. See *Keating v. Cincinnati*, 38 O. S., 141.

Our conclusion therefore is that the city has a right to proceed with the improvement in question without first compensating the plaintiff for any property right taken for the purpose of making such improvement; that in doing so the plaintiff is not deprived of any constitutional right; that plaintiff has an adequate remedy at law to recover compensation for any property right so taken as well as any other damages suffered.

While this was a hearing upon a motion for temporary restraining order, yet by consent of the parties it was treated as a final submission of the case, and therefore the motion will be denied, the temporary restraining order heretofore granted will be vacated, and the plaintiff's petition will be dismissed.

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Lucke v. Eisenstadt.

PRICE RECEIVED AT AUCTION AS EVIDENCE OF THE MARKET VALUE OF REAL PROPERTY.

Superior Court of Cincinnati.

JOHN H. LUCKE ET AL V. HENRY EISENSTADT ET AL.

Decided, December 9, 1914.

Evidence—Breach of Contract to Purchase—Value of the Property Involved—As Evidenced by Price Received at Re-Sale—Value of Vendee's Right to Purchase, Distinguished from Market Value of Property.

In an action between vendor and vendee for damages for refusal to perform a contract to purchase real estate, the price obtained by the vendor on re-sale of the property at auction, after notice to vendee, will be received as some evidence tending to show market value, provided the conditions surrounding such re-sale and the terms thereof are such as to appear to be fair and reasonable, although the terms of such re-sale are not identical with the terms of the original contract of sale nor as favorable to the purchaser.

Alfred Bettman and John D. Ellis, for plaintiffs.

D. S. Oliver, for defendants.

MERRELL, J.

This action was brought for damages upon the defendants' breach of a written contract to purchase of the plaintiffs certain residence property. Upon defendants' refusal to proceed under the contract and to pay the purchase price, the plaintiffs, through real estate agents, advertised the property for sale at public auction, and it was sold at a price less than that of the original contract of sale.

At the trial, evidence was admitted over the defendants' objection, of the price obtained upon such re-sale at auction. There was also evidence of real estate experts as to the market value of the property at the time of the defendants' breach of contract to purchase, but the verdict returned (for the plaintiffs) was in a sum representing the exact difference between the price under the original contract and that obtained on re-sale.

If the evidence as to price obtained on re-sale was incompetent, the verdict can not stand.

As to this evidence, it is contended, (1) that testimony as to price obtained on re-sale is not competent at all. This doctrine obtains in Georgia and perhaps in New York. (2) It is also contended that if the price at re-sale is competent evidence in any case, it is so only when the terms upon which the property is offered at re-sale are at least as favorable as those of the original contract. This is the view held in a number of jurisdictions, notably Pennsylvania and New Jersey. Annotations to *Cowdrey v. Greenlee* (Ga.), 8 L. R. A. (N. S.), 137; *Ramsay v. Hersker*, 153 Pa. St., 480.

In the case at bar the terms of the re-sale at auction required of the purchaser a larger cash payment and a shorter time for deferred payments than did the original contract of sale upon which suit was brought. The original contract required the payment of about one-sixth of the purchase price in cash, whereas the terms of the auction required one-half cash. Under the Pennsylvania rule, therefore, the testimony as to price obtained at re-sale would have been excluded. So far as the court is advised the question has not been authoritatively passed upon in this state, so that it may be determined upon principle rather than by precedent. It is, of course, entirely clear that the measure of damages in such case is the difference between the contract price and the market value of the property at the time of the vendee's breach. The only question, therefore, is whether the price obtained at re-sale is some evidence of market value. The weight of authority, both in England (*Noble v. Edwards*, L. R. 5 Ch. Div., 378) and in this country, is that the price obtained on re-sale is, under certain conditions, competent evidence of market value. In most jurisdictions, in this country, however, such evidence is received only in cases where the terms of re-sale are as favorable as those of the original contract. This limitation is thought to be the result of a confusion of ideas—a confusion in brief, between what is evidence and the rule of damages. In fact, in some jurisdictions where the evidence is received within the limitation indicated, the courts have said that the vendor has

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a right to re-sell the property at the vendee's risk, or have at least indicated that the vendor's loss upon re-sale is *prima facie* the measure of damages. If this be indeed the measure of damages in such case, it is quite clear that the price received upon re-sale is of probative force only where the terms of re-sale are at least as favorable as those of the original contract. In this state, however, no such *rule of damages* obtains, and evidence of whatever description is competent only *as evidence* for the consideration of the jury in working out the true measure of damages which is the difference between the contract price and the market value.

It follows that if the price obtained at re-sale is competent at all, it is so simply as some indication of the true market value. The only proper limitation, therefore, upon the admission of evidence of the price obtained at re-sale, is that the terms of re-sale shall be reasonable and such as would probably result in as favorable a bid as the value of the property will admit of. To limit the evidence to cases where the terms of re-sale are identical with the terms of the contract is to permit evidence, not of the market value of the *property*, but of the market value of the vendee's *contract right* to purchase. Market value is, theoretically at least, a definite and fixed sum. It is not a variable dependent upon the terms of sale. This is commonly recognized in receiving the testimony of experts as to value, the opinion of such expert being received as to the market value at a given time, and not his opinion as to what price would be obtained for the property under varying conditions and terms of sale.

It follows that in the case at bar the testimony as to price obtained on re-sale at auction was competent, although the terms of the auction were perhaps not as favorable to the purchaser as the terms of the original contract. It is always a question for the court in passing upon the admissibility of such evidence, to determine as a matter of fact whether the terms and conditions of re-sale were sufficiently fair and reasonable to permit the price obtained being considered by the jury. In the present case, the publicity given to the auction, the terms of sale, the number of bidders attending, and the notice of the sale both to the public

and to the defendants, were such that the court determined as a matter of fact, and properly, it is thought, that the evidence was competent for the consideration of the jury.

The petition in this case counted, of course, upon the written contract, which at the trial turned out to have been accidentally destroyed by fire after the bringing of the suit. On this motion for a new trial it is contended that the plaintiffs should have declared upon a lost contract or before trial should at least have amended the petition so as to advise the defendant that the contract had been destroyed. This contention is based upon the case of *Chamberlain v. Sawyer*, 19 Ohio, 360, where it was held that a declaration averring the existence of a bond and making profert thereof was not sustained by proof of a lost bond. The principle of the case cited should not, and does not, extend farther than to actions upon a specialty such as a bond or a note. The common law principle of profert does not apply to ordinary contracts. Moreover, in the present case, the defendants did not at the trial claim surprise and the objection comes too late when first made on motion for a new trial.

Other grounds urged in support of the motion were sufficiently dealt with at the oral hearing.

The motion for a new trial is overruled.

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Wolf & Bro. v. Union Stores.

**ADJUDICATION IN BANKRUPTCY OF ONE WHOSE PROPERTY
IS IN THE HANDS OF A RECEIVER APPOINTED
BY A STATE COURT.**

Common Pleas Court of Franklin County.

**LEE WOLF & BROTHER V. THE UNION 5 & 10 CENT STORES
COMPANY.**

Decided, January Term, 1915.

*Transfer of an Insolvent Estate from the State to the Federal Court—
Jurisdiction of the State Court to Confirm the Account of Its Re-
ceiver and Order Payment of Costs, Fees and Expenses.*

1. When the defendant to an action in the state court in which a receiver has been appointed is adjudged a bankrupt, but such adjudication is made after part or all of the property has been sold and converted into cash, the bankruptcy court has no right to require the trustee appointed by it to take charge of the proceeds of the property in the hands of the state receiver before he has accounted to the state court and his account is settled and approved.
2. The rule which has been adopted in the decisions of the courts is that where no fund is in the hands of the state receiver, at the date of the adjudication in bankruptcy, out of which compensation of the receiver and counsel and other expenses may be paid, such persons claiming the right to be paid out of the property must be remitted to the bankruptcy court for the adjudication and establishment of their respective claims.

Morton, Irvine & Blanchard, for plaintiff.

KINKEAD, J.

The first report and account of George B. Donovan as receiver of the defendant company is submitted for approval.

The receiver and his counsel also ask for allowances to be made for their services rendered in the administration of the trust.

Since the appointment of the receiver by this court in this case, proceedings in bankruptcy have been commenced, and the defendant company was declared a bankrupt on November 4th,

1914. The affairs of the company, therefore, pass into the jurisdiction of the federal court as of that date.

Conflict and annoyance between the two courts is constantly arising, much to the detriment of the administration of such trusts. Where there are preferences which may be invalidated under federal statutes in bankruptcy proceedings, then parties have substantial rights involved so that there is ample justification for transferring cases to the federal court. But it frequently happens that cases are taken to that court where there are no such questions, so that it makes no difference to the creditors as to which court administers the trust. When a receiver has been appointed by this court in a case where there are no preferences that may be invalidated in the federal court, there can be no reason for taking the case into the bankruptcy court unless it be for the purpose of having other persons administer the trust, and the personal benefit to be derived.

When such cases are taken to the bankruptcy court for such reasons or purposes, it does a positive and material injury to the trust and creditors, by adding double costs to the administration of the same.

The current opinion has been that from the date of the adjudication of bankruptcy the right of this court to make allowances to its receiver and counsel ceases, it being within the exclusive power of the federal court to do so. The result of such opinion is that there is often a rush into this court to have allowances made before the actual jurisdiction of the United States Court attaches.

Such a view is incorrect. There should be no alarm, no undue haste in presenting claims for compensation to this court.

A proper understanding of the relative functions of state and federal court in this matter ought to operate in a measure to correct the abuses in the administration of such trusts and the consequent injury to creditors.

When the defendant to an action in a state court in which a receiver has been appointed is adjudged a bankrupt, but such adjudication is made after part or all of the property has been

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sold and converted into cash, the bankruptcy court has no right to require a trustee appointed by it to take charge of the proceeds of the property in the hands of the state receiver before he has accounted to the state court, and his account is settled and approved.

Indeed no receiver of this court should transfer any property or assets in his hands until the court appointing him makes an order authorizing him so to do.

And this court will require the trustee in bankruptcy to present his authority and credentials, that is, a certified copy of the adjudication of bankruptcy, and his letters of trusteeship, before it will make a transfer of funds or property to him. This, the court will not do until its receiver has filed his account, and the same has been approved. Nor will the court authorize or order its receiver to transfer property or pay over money into his hands, until it has made due and proper allowances to such receiver and his counsel, nor until all the costs and expenses of administration have been fully paid, if there is money on hand to pay the same.

The rule adopted by the decisions of the courts is that where no fund is in the hands of the state receiver, at the date of the adjudication in bankruptcy, out of which the compensation of receiver and counsel and other expenses may be paid, such persons claiming the right to be paid out of the property must be remitted to the bankruptcy court for the adjudication and establishment of their respective claims. *Hanson v. Stephens*, 119 Ga., 722.

“On adjudication in bankruptcy, and it is made to appear to the state court that the court of bankruptcy is entitled to administer the property in its custody, it remains for the state court to transfer the assets, settle the accounts of its receiver and close its connection with the matter. Fees and expenses of receivership may be allowed by a state court and paid from the funds in the possession of the receiver, obtained from the disposition of property by direction of a state court.” *Loveland on Bankruptcy*, pp. 150, 151; *In re Watts and Sachs*, 190 U. S., — 10 A. B. R., 113; *Loveland v. Southern Grocery Co.*, 159 Fed., 415 (20 A. B. R., 180); *Mauran v. Crown Carpet Lining Co.*, 23 R. I., 344 (6 A. B. R., 140).

The trustee in bankruptcy is vested "only with the title of the bankrupt as of the date he was adjudicated." Therefore when such title is in an officer of a state court, it is the custody and jurisdiction of such court, and is subject to all the liens for costs and expenses which no other court may rightfully assess and adjudge. Hence it is within the jurisdiction and power of such state court to allow the receiver's fees and expenses incurred before adjudication, and order the balance turned over to the trustee in bankruptcy on production of evidence of his legal right thereto. *Mauran v. Crown Carpet Lining Co.*, 23 R. I., 344 (6 A. B. R., 140); *Wilson v. Parr*, 115 Ga., 629.

The receiver during the period of conduct of the business received in cash \$1,108.73, and disbursed \$501.70, leaving a balance in his hands of the sum of \$607.03. The receiver and counsel gave one month's time to the business. There are bills unpaid for rent, gas, electric light, insurance, clerk hire, bond fee amounting to \$317.38. The court costs are \$27.05.

The court therefore orders that an allowance be made to the receiver of \$200 and to his counsel the sum of \$200. It is ordered that out of the cash on hand the receiver pay the expenses incurred by him for rent, etc., the sum of \$317.38, and the costs of this court amounting to \$27.05.

It having been made to appear to the court by a certificate from the bankruptcy court that Hugh Dugan has been appointed trustee of the estate, it is ordered that the receiver turn over to him all the property, and the balance of any money in his hands.

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Macey v. Greenhalgh et al.

PROTECTION TO INFANT REVERSIONERS.

Common Pleas Court of Cuyahoga County.

KATE E. MACEY v. CATHERINE GREENHALGH ET AL.

Decided, January 7, 1913.

Partition—Order for, Questioned by Infant Reversioner After Coming of Full Age—Respective Rights of Life Tenant and Remaindermen Who Are Minors—Section 11603.

1. An infant may, within twelve months after coming of full age, question the validity of an order for the partition of lands in which she is a reversioner, where during infancy she had answered through a guardian *ad litem* denying the plaintiff's right of action.
2. Where land sought to be partitioned is held in part by the plaintiff in fee and in part as a life estate with infants as remaindermen, and a single improvement covers both parcels, a case of equitable partition is presented.
3. In such a case the ordering of a partition and consequent sale of the property is within the discretion of the court; and where the plaintiff is in possession of the entire property and is receiving the rents and profits therefrom, and its sale by the sheriff would be to her advantage and to the disadvantage of the children, a demurrer to the petition of one of the minors who has become of age, asking for an order vacating the previous order for a partition, will be overruled.

Joseph L. Stern, for plaintiff.

Allison M. Gibbons, for defendants.

F. F. Klingman, for United Banking & Savings Co.

BABCOCK, J.

George H. Macey and Kate E. Macey, husband and wife, held sub-lots 48 and 49 in fee as tenants in common, and George H. Macey held sub-lot 50 in fee, the same being contiguous to the first named lots. The entire frontage constituted a block or tract of land with 127 feet on West Madison avenue in the city

of Cleveland. Mr. and Mrs. Macey built a terrace covering the entire property, without reference to lot lines, and George H. Macey died testate, leaving the entire property mortgaged to the United Banking & Savings Company for \$5,000, in which mortgage both husband and wife joined, and upon which there remains \$3,000 unpaid. George H. Macey devised his estate in these properties to his wife for life, with a remainder to his grandchildren. He provided that after the death of his wife, Kate E. Macey, all of his real estate shall pass to and vest in his grandchildren, being four minor defendants in this action, and such other children of his sole surviving son, William P. Macey, as may be living at the time of the death of his said wife, Kate E. Macey. The will further provided that it is the intention of the deceased that each of the grandchildren of said George H. Macey, deceased, living at the time of the death of the plaintiff herein, Kate E. Macey, shall be equal owners of his real estate in fee simple.

George H. Macey died, and Kate E. Macey filed her petition for partition of the entire premises, in November, 1910.

The minor children are impleaded, and by a guardian *ad litem* they answer denying generally the allegations of the petition.

On trial the court found for the plaintiff, ordering partition and the foreclosure of the mortgage of said the United Banking & Savings Company. The commissioners made a report that partition by metes and bounds could not be made, and appraised the premises in two parcels, lots 48 and 49 as one parcel, and lot 50 as the second parcel.

The court ordered a sale, on application of the plaintiff only, as the mortgagee does not press for a sale of the property. The appraisal of both parcels was \$15,565. The property was offered at public sale, and was purchased by the plaintiff at substantially two-thirds of the appraised value, or about \$10,400. It is now before the court on the motion to confirm. In the meantime one of the grandchildren, Cleopha Macey, has become of legal age, and has, within a year thereafter, filed in this ac-

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tion a petition to vacate the judgment ordering partition, charging that there was error in the judgment in this, that the plaintiff is not a co-tenant or a co-parcener with defendants in a part of the premises, sub-lot 50, in which she is only an owner of a life estate, and that the petition does not set forth facts sufficient to constitute a cause of action, for that she is not entitled to partition, being in possession of the entire premises.

To her petition plaintiff demurs, and the questions to be decided are involved in this demurrer and the motion to confirm the sale. Among the questions involved are the following:

First. May Cleopha Macey question the validity of the order in partition, she having, in her infancy, answered by guardian *ad litem* denying the plaintiff's right of action?

Section 11631, paragraph 8, provides:

"The common pleas court * * * may vacate or modify its own judgment after the term at which it was made, for errors in a judgment shown by an infant within twelve months after arriving at full age, as prescribed in Section 11603."

This last section only abrogates the rule requiring that the right should be reserved in the entry of the judgment. 45 O. S., 93.

I think there can be no question but what this defendant, having recently become of age, may question the validity of the entire proceedings up to this time.

It was held in *Long v. Mulford*, 17 O. S., 484, in a suit by a bill in equity against an infant for the specific performance of an alleged contract with his ancestor, that he is entitled to a day in court after coming of age, to show cause against the decree, and that it may be impeached for error by an original bill; and what would have been a good cause of action to sustain an original bill is a good cause of action under the code.

Second. In the case of *Elrod v. Bass*, 1 C. C., 38, plaintiff claimed to be the owner of a life estate in two tracts of land, and the owner of an undivided interest in remainder in each. The court found such to be the situation, but that in one of the

tracts two of the owners of the remainder subject to the life estate had received certain advancements to the amount of \$1,300; and the will of the ancestor provided that at the death of his wife the land was to be so divided that each of the other children should receive \$1,300 in value of said land before the two who had received an advancement should receive anything; and then if any of the land remained, it was to be equally divided among all of his heirs; and in the other tract, that the heirs who had estates in remainder should be such as were living at the death of the life tenant whose estate had been assigned to the plaintiff.

In the common pleas court partition was ordered, but, on appeal, the circuit court entered the following judgment:

"This day this cause came to be heard upon the pleadings, the evidence, and arguments of counsel; and the court, being fully advised in the premises, finds that plaintiff has no present right to a partition of the land described in his petition, and the same is dismissed without prejudice to the beginning of such an action at the death of Cynthia Elrod.

"It is therefore ordered and adjudged by the court that said cause be, and the same is, dismissed at the costs of the plaintiff, George W. Elrod."

In the opinion of Smith, J., it is held that:

"If there be an outstanding life estate on the whole of a particular tract of land held by a person who is not an owner of any reversionary interest or estate in remainder in said premises, an action for the partition thereof can not be maintained by any owner of any interest in a reversion or remainder therein."

And *Tabler v. Wiseman*, 2 O. S., 207, is cited as authority for the proposition.

"But if one of the remaindermen or a reversioner is also the owner of a life estate in the whole premises, he may maintain such an action; and if his interest therein can be set off to him without injury to the value of the residue of the estate, it may be done. This may be necessary to enable such owner of the life estate and an interest in remainder properly to enjoy and im-

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prove his share of the estate; and there ought not to be a partition of the residue among them, for the reason that if it should be done, they could acquire thereby no present right to the possession of their shares so set off; and the value of such shares, on account of depreciation of the building or improvements therein, or for other reasons, may greatly change before the termination of the outstanding life estate. Nor ought there to be a sale of the premises subject to such life estate if it can not be so divided without consent, for in such case the owner of the life estate manifestly would have a great advantage over the other parties in interest or persons proposing to be purchasers thereof. If an owner of a life estate agrees to the sale of the premises free from his estate therein, and consents to take the value thereof in money, to be fixed and ascertained by the court, we are of opinion that such sale may be had if it appears to the court that it will not be to the prejudice of the other parties in interest. The petitioner here, however, is not entitled to a partition of the first described tract, for the reason that Cynthia Elrod, whose heirs are to take the estate at her death, is still living, and therefore it is uncertain, and can not possibly be now ascertained, who will be the heirs of said Cynthia Elrod, or what the shares of each of her heirs will be. Nor is he now entitled to a partition of the said second tract against the objection of any one of the remaindermen, for the reason that by the will of the testator the division thereof among his heirs and the settlement of the advancements made to two of his heirs was to be made and determined after the death of the said Cynthia Elrod, and the application now made for the partition thereof is premature."

Ruled by this case, I should be of opinion that the plaintiff is not entitled, at the present time, to a sale, for the reason that the will of George H. Macey, deceased, provides for his real estate passing and vesting in his grandchildren, being then four minors, and such other children of his sole surviving son, William P. Macey, as may be living at the time of the death of his said wife, Kate E. Macey, were it not for the fact that the question has already been adjudicated, and, as I am informed, has been decided otherwise by another branch of this court. If such be the case, the proper practice would be to sustain the original petition, and the decree in partition thereunder, leaving it for the circuit court to review; but being uncertain whether this

phase of the case ever passed under the scrutiny of this court when the decree was entered in Room 1, I shall refer it to the judge who entered the decree, to determine this last question, and will enter such a judgment as he authorizes.

Being informed by the judge who entered the decree that the question of law presented to him involved the right of one having the entire possession of the premises to a partition where his holding is in part as life tenant and the remaining part in fee, and that no other question was considered or determined by him, I find the questions now presented not to have been passed upon.

Sale in partition did not exist at common law; but since the reign of Elizabeth, courts of equity have exercised jurisdiction in partition when equitable rights were involved, and a sale of the property where partition was not practicable was ordered in the court's discretion; and it is sometimes refused because found to be inequitable.

In *Shilleto v. Pullan et al*, 2 Disney, 588, Hoadly, J., says on page 591:

"In a partition in equity, whatever may be true of the statutory remedy, sale will be refused unless it is shown to be absolutely essential to the enjoyment of the petitioner's right. For, except in such contingency, one owner's dissent is equal to the other's assent. One has as much right to ask a refusal as the other the order of sale."

In actions at law, sale is governed by statute; and is generally allowed when partition is found to be impracticable. In most jurisdictions the sale is a matter of right if partition can not reasonably be made, but in some jurisdictions it rests, even in that event, in the court's discretion. When the rights of infants are involved, in those jurisdictions in which sale is held to be a matter of right, the courts, as guardians of the interests of minors, may refuse sales to infant plaintiffs, but will not refuse sales to adult petitioners who are otherwise entitled to it, on the ground that it is against the interest of infant defendants who are in court objecting to it. There are some jurisdictions, however, where partitions being found impracticable, sale is left to

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the discretion of the court, and is not made a matter of right. In this state the statute says the court may order a sale of the property. This was construed in the *Elrod v. Bass* case to vest the court with a discretion as to ordering sale, and the court, consequently, in that case refused it.

This is a suit for equitable partition. There is a certain part, to-wit, one-third of the property, which is held by the plaintiff in fee, and is involved with the other part of the property sought to be aparted, only because the building upon the property held by tenants in common reaches over and upon plaintiff's real estate in which the defendants have no interest. The inability to sever the property by reason of the improvements brings into the case equitable considerations, and justifies the statement that it is a case for equitable partition.

The matter of ordering a sale rests in the discretion of the court. It is difficult to offer any reason for a sale of this property, except to advantage the plaintiff by forcing the interests of the children to a sacrifice by sheriff's sale, with the consequent gain to plaintiff by buying it in at a depressed valuation. It is not probable the plaintiff would urge partition of the property if the children were not alien to her blood. It is sometimes desirable for a tenant in common to have partition in order to improve his estate, but this property being improved to the extent that it is entirely covered by a terrace, withdraws it from such considerations. The interests of the children will be jeopardized by a sale.

The reasons given for refusing sale in the case of *Hartmann v. Hartmann*, 59 Ill., 103, obtain here. The court say, page 104:

"It is assumed that the right of partition of lands, and the consequent sale, if not susceptible of division, is absolute, and that it is arbitrary to refuse the prayer of the bill.

"A general superintendence of infants is now exercised in courts of chancery, as a branch of general jurisdiction. Indeed, it is one of the peculiar duties of courts of equity to protect the rights of infants. From the earliest period courts of chancery have been vested with a broad and comprehensive jurisdiction over the persons and property of infants. The power and duty

of the courts in this regard are clearly shown by Judge Story, 2 Vol. Eq. Ju., Ch. 35. He says: 'Whenever a suit is instituted in a court of chancery, relative to the person and property of the infant, although he is not under any general guardian appointed by the court, he is treated as a ward of the court, and as being under its especial cognizance and protection.' * * *

"We are satisfied that the land is the safest investment. It can not be squandered, as too often happens with the money of infants. * * *

"We can not consent that this property, now safe from the fluctuations of prices, the accidents of money-lending, and the faithlessness of guardians, shall, without any necessity, be changed into a fund which may take wing and fly away. It might prove a greivous wrong to these children, of which we have no ambition to be guilty."

The plaintiff is in possession of the entire property and is receiving the rents and profits of the same. There is nothing pressing that need urge her to a sale of the property. There is nothing requiring a sale of it, and every equitable consideration opposing it, if the interests of the children are to be conserved.

I am, therefore, of the opinion that the demurrer to the supplemental petition of Cleopha Macey should be overruled.

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ISSUE RAISED IN A WILL CONTEST AS TO PLAINTIFF'S INTEREST.

Common Pleas Court of Franklin County.

HELEN E. ARNOLD ET AL. V. HERBERT J. PEASE ET AL.

Decided, March 3, 1914.

Wills—Contest of—Denial of Plaintiff's Alleged Interest Makes a Primary Issue Triable to the Court—Amendment Asserting a Different Interest Not Permissible After Expiration of the Statutory Limitation—Laches Affecting Right to Amend.

1. An amendment which is a departure from the original petition will not be allowed after the bar of the statutory limitation has intervened.
2. A motion for leave to file a certain amended pleading will be overruled when the pleading tendered is clearly faulty in form or demurrable.
3. A motion for leave to amend for the purpose of alleging a different interest to support the plaintiffs' right to contest a will, filed after a trial and finding against the plaintiff's original claim of interest, will be overruled as too late; and with added reason when it appears that the plaintiffs are chargeable with laches, and that, at an earlier stage of the case, they were expressly advised by the court of the need of amendment if such different interest was to be asserted by them.

Badger & Ulry, F. B. McKennan, Chas. A. Lyche and Herman C. Rogers, for plaintiffs.

R. H. Platt, J. T. Holmes, J. J. Adams and F. M. Raymond, contra.

EVANS, J.

This case is submitted on motion of the plaintiffs for leave to file an amended petition.

The action seeks to contest the last will and testament of Catherine M. Tuttle, deceased.

On December 5, 1912, the plaintiffs filed a petition in this court against the defendants, seeking to contest the will of said Catherine M. Tuttle, deceased.

Said last will and testament was admitted to probate in the probate court of this county on December 7, 1910.

The petition was filed, and the said action commenced two days before an action to contest said will would have been barred by operation of the statute of limitations.

Said petition, after averring the death of said Catherine M. Tuttle, alleged that said Catherine M. Tuttle died leaving the plaintiffs and certain of these defendants, naming them, as her next of kin and only heirs at law. That said Catherine M. Tuttle was never married and deceased leaving no child or children, father or mother, brothers or sisters, leaving no heirs nearer related to her than these plaintiffs and defendants herein enumerated, and the unknown heirs of any deceased heirs of Catherine M. Tuttle; and leaving an estate consisting of real and personal property of the value of more than one million dollars.

That plaintiffs are related to said Catherine M. Tuttle, deceased, in the following manner; then naming certain of the plaintiffs as second cousins, and others as third cousins, and others as more distantly related.

On January 4, 1913, A. D. Heffner, defendant, filed an answer, averring that plaintiffs have not legal capacity to sue, or bring this action, for the reason that they are not, nor is any one of them of the heirs or of the next of kin of said decedent Catherine M. Tuttle, or interested in said will. Said answer then alleges that the only heirs and next of kin of said decedent, Catherine M. Tuttle, are Martin Tuttle, Elias Tuttle and Alma Tuttle Spurr, being the children of a full brother of said decedent's father, and Minta E. Tuttle and Herbert M. Tuttle, being the children of Addison Tuttle, who pre-deceased said decedent, Catherine M. Tuttle, and was a brother of the first three above named.

That plaintiffs claim descent from one William F. Medbery, and are not, nor is any one of them, otherwise related to said decedent Catherine M. Tuttle, than through their descent from the said William F. Medbery who was only a half brother of

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said decedent's mother. That Joseph Medbery, the father of said William F. Medbery was also the father of decedent's mother, but the mother of said William F. Medbery was Mary Potter Medbery, first wife of said Joseph Medbery, and the mother of decedent's mother was Hannah Brown Medbery, the second wife of the said Joseph Medbery.

Said answer then alleges a defect of indispensable parties defendant, to-wit (here names a number of persons as heirs and next of kin to said Catherine M. Tuttle; also names a number of legatees under said will of Catherine M. Tuttle, none of whom are named or joined as parties in said petition). Said answer avers that the plaintiffs are not entitled to be answered upon their allegation that the paper writing purporting to be the last will and testament of said Catherine M. Tuttle, deceased, is not her last will and testament, and prays judgment of the court thereon, to determine whether the plaintiffs are entitled to be answered upon their said allegation touching said last will and testament, and whether defendant shall be held to further answer herein.

This answer was filed on January 4, 1913; no reply was ever filed by plaintiffs, or any party in interest.

On May 15, 1913, a motion filed by defendants was submitted to one of the branches of this court to dismiss this action, upon the uncontroverted statements of said answer of Heffner filed January 4, 1913, for the reasons, that plaintiffs have no right of action; have not legal capacity to sue; and for defect of parties defendant.

The court, on consideration, overruled the motion to dismiss, on the ground that the source from which decedent derived title to the real estate is not described by either the petition or the answer. That if the answer had also alleged that none of the real estate belonging to decedent had come to her by descent, devise or deed of gift from the maternal side of the house, it would seem an admission of those facts would be fatal to the plaintiffs. But if part of the real estate came to decedent from a maternal ancestor, it would seem that plaintiffs would have an interest to contest the will.

The question of the right to amend the petition so as to plead that part of the real estate came by descent, devise or deed of gift from a maternal ancestor was not then made nor decided; and no leave was asked by plaintiffs then to file an amended petition, and none such has been filed.

On November 6, 1913, said case was assigned to the chancery branch of this court for hearing on the issues made in the answer of defendant, that the plaintiffs have not legal capacity to sue or bring this action, for the reason that they are not, nor is any one of them, of the heirs or of the next of kin of said decedent, Catherine M. Tuttle, and the case was then heard on the petition, the answer, and the evidence.

On consideration the court found and decreed that said preliminary issue was properly submitted to be tried prior to the main issue, and the court held, that from the undisputed evidence the plaintiffs are not the next of kin of said decedent, Catherine M. Tuttle, as in their petition alleged, and are not entitled, on the allegations of their petition, to bring this action, or to be answered upon their allegation that the paper writing purporting to be the last will and testament of the said Catherine M. Tuttle, deceased, is not the last will of said Catherine M. Tuttle, deceased.

The plaintiffs excepted to the said ruling and judgment of the court at the time, and gave notice of their intention to appeal to the court of appeals of this county, and the court fixed the amount of the appeal bond at \$250.

The plaintiffs then asked leave to file an amended petition. The court did not pass on the question of the right to file an amended petition, but the court suspended judgment on the foregoing finding, and allowed plaintiffs ten days in which to file an application or motion for leave to amend or file an amended petition. to which defendants excepted, and defendants excepted to the suspension of final judgment dismissing the petition.

Thereupon plaintiffs file this motion, asking leave to file an amended petition, and attach the proposed amended petition.

And this is the motion here for determination at this time.

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The defendants strenuously object to the filing of said amended petition, and claim that the amended petition pleads new matter that constitutes a departure from the cause of action pleaded in the original petition; that the statute of limitation would now bar plaintiffs from maintaining the cause of action pleaded in the amended petition; that the primary issue—that plaintiffs are not interested parties—has been adjudicated, and the court has held that plaintiffs are not, nor is any one of them, of the heirs or of the next of kin of said decedent; that the motion for leave to file an amended petition comes too late; that plaintiffs are guilty of laches; that there is a defect of necessary parties; that the amended petition proposed is demurrable and faulty in form.

I have given the questions involved careful consideration. A determination of the question of departure in a pleading, whether a different cause of action is pleaded, is often a difficult one, and especially where the bar of the statute of limitations intervenes.

It is to be borne in mind that when defendant filed his answer denying that plaintiffs were heirs at law and next of kin to said decedent, and pleading who the next of kin to decedent were, and facts to show that such persons were more closely related to decedent by consanguinity than plaintiffs, this raised a material issue in the case, which was the primary issue, and if true would defeat plaintiffs from contesting said will, for the reason that plaintiffs were not persons interested.

This primary issue was an issue to the court, and came on for hearing before the chancery court on the petition, the answer, and the testimony. In fact the allegations in the answer that plaintiffs were not next of kin, and the allegations therein naming the persons other than plaintiffs, who were the heirs at law and next of kin to said decedent, were not controverted by a reply by plaintiffs.

The court, on the pleadings and the testimony adduced, found that issue against the plaintiffs, and found that plaintiffs were not heirs at law and next of kin to said Catherine M. Tuttle, deceased.

Now, plaintiffs seek to file an amended petition after the bar of the statute of limitations has intervened, and to claim and plead that part of the real estate of which said decedent died seized, amounting to about \$15,000 came to said decedent by devise from a maternal ancestor of decedent and these plaintiffs, and should descend and pass in parcenary to these plaintiffs as ancestral property, and that plaintiffs have a direct financial interest in said estate of said Catherine M. Tuttle, deceased, to the extent of about \$15,000.

Is the proposed amendment a departure from the original petition? This is the vital question here presented, and one that I have given extensive consideration and investigation.

The difficulty in reaching an intelligent and satisfactory conclusion arises from the fact that the statute of limitations has interposed between the date of filing the original petition and the motion for leave to file the amended petition.

It is difficult to escape the conviction that persons who by filing an action in court to contest a will, at the time of preparing and filing their petition know the relation they sustained to the deceased testator, and know, if they are interested persons, who under the statute would have a right to contest the will, what that relationship and interest in fact is.

The plaintiffs in this case never, at any time, questioned or denied the facts set up in the answer of defendant, Heffner, that Martin Tuttle, Elias Tuttle, Alma T. Spurr, Minta E. Tuttle and Herbert M. Tuttle, were the next of kin and only heirs at law of Catherine M. Tuttle, deceased. The testimony before the court on the hearing conclusively proved the facts alleged in said answer, and the court adjudged and decreed that plaintiffs were not next of kin to decedent.

The result of this judgment defeated the right of plaintiffs to contest said will under their petition. If plaintiffs did not know when they filed their petition that they were not, in fact, next of kin to said decedent, they should have known this, for the statute had given them two years from the date of probating said will to ascertain all the facts necessary to plead within that

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time; facts to show the interest, if any, they had, that would entitle them to contest said will.

By the proposed amended petition plaintiffs now seek to plead facts to make a new material issue in this case, which is an abandonment of a plea of interest on the ground that they are heirs at law and next of kin to said decedent, and seek to plead that they are representatives of a common ancestor of plaintiffs and said decedent, and that part of the real estate of which testator died seized is ancestral property, and thereby plaintiffs have a direct financial interest in said estate.

By the original petition, as heirs at law and next of kin, as alleged, to decedent, they sought to share in an estate, as therein pleaded, of more than one million dollars.

By the new issue in the proposed amended petition they now depart from their claim, aforesaid, and seek to share in ancestral property of the value of about \$15,000. The original petition asserts an interest as "next of kin" which rests on Section 8574, General Code; the proposed amendment, on the contrary, attempts to show an interest founded on Section 8573, which would be in diminution of rights under Section 8574 and of the share of the "next of kin."

Plaintiffs, about one year after an action to contest said will became barred by the statute, seek to file an amended petition setting up a state of facts so differing from the facts pleading interest in the original petition, that, in my opinion, it constitutes a departure from the action set forth in the petition. And this motion to so amend is first made some six or seven months after one branch of this court had suggested that if any of decedent's real estate was ancestral property, plaintiffs might have an opportunity to seek to amend; and, also, after the issue as to plaintiff's claim in the original petition had been subsequently heard on the pleadings and the testimony, and had been decided adversely to plaintiffs.

I am of the opinion that this case falls within the rule generally held by the courts applicable to a departure; the bar of the statute having intervened, it is too late to amend as proposed by the plaintiffs.

In *Marriott v. The C., S. & H. R. R. Co.*, reported in 2 N.P. (N. S.), 231, the court held that where a party has been brought into the case in one capacity, and is, after the statute has run, brought in in another capacity, the bar of the statute having become effective, the plea of the statute is good.

In *Cobb et al v. Fogg et al*, 166 Mass., 466, defendants sought to amend their answers in order to plead that the bill was multifarious. The court refused leave. The Supreme Court on review held that the objection of multifariousness was not set up in the answer, and that it came too late to amend the answer when the statute of limitations would have been a bar to a new suit on the note.

In *Irwin et al v. Bank of Bellefontaine*, 6 O. S., 89, the court in the opinion, commenting on the code, say:

“Cases undoubtedly will occur where it will not be in furtherance of justice, but a manifest and clear encouragement of a litigious spirit to permit an amendment; and probably in such cases, the court will not interpose, where, too, the defect in the proceeding is so gross, or is committed under such circumstances as to indicate that the defect itself was designed, and not simply a mistake, the court would probably refuse permission to amend; for in such case no mistake has in fact been made.

“The general rule is that the language of the statute must prevail, and no reasons based on the apparent inconvenience or hardship can justify a departure from it.” *Maxwell on Code Pleading*, 474, and authorities there cited.

In *Commissioners v. Andrews*, 18 O. S., 49, the original action was based upon the bond alone. By the amended petition a recovery on the bond is sought, without any indication of a purpose to add another cause of action.

The amended petition differed from the original chiefly in stating fully all the circumstances that gave rise to the bond, or that which constituted the consideration therefor.

It was claimed by plaintiffs that, although the bond may be void, a case is made in the amended petition, to recover at least the amount of the county orders, \$15,000, and interest. The court say:

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“If this can be done, it must be either upon the ground of the fraudulent procurement of the orders, or of an implied promise of the defendants to repay their amount to the commissioners.

“It is apparent from the condition of the bond, as well as from other facts stated in the petition, that the fraud complained of was known by the commissioners at that time. This action was commenced more than four years after the discovery of the alleged fraud.

“If, however, it be conceded that an action could have been maintained on an implied liability upon the facts alleged in the amended petition; if it arose when the orders were procured, or when they were applied in payment of the judgment against defendant—the only time when he received any benefit from the transaction—a period of more than six years had elapsed before the commencement of this suit, and the action would be barred by the statute of limitations.

“If the amended petition be construed as having, in addition to an amended cause of action on the bond, another cause of action interpleaded with, and masked under that, it can hardly be claimed that the court erred in sustaining the defendant’s motion by striking out all the matter that was redundant to the action on the bond.

“When the amended petition was filed, more than six years had elapsed after the orders were fully paid. The ruling of the court in sustaining the motion at once expurgated the petition of matter not material to the action on the bond, and was also equivalent to a refusal to so far extend the leave to amend, as to permit the plaintiffs to engraft on to the original cause of action a new and distinct cause of action that was barred by the statute of limitations.”

The Supreme Court in *Townsend v. Eichelberger*, 51 O. S., 216, say:

“It is well settled that absence of the plaintiff from where the facts arose, or his residence in remote and secluded parts, making it difficult or impossible to obtain information, in no case affects the running of the statute against him. * * * It is no longer the habit of courts to view with disfavor the plea of the statute of limitations, being a statute of repose, designed to secure the peace of society and protect the individual from being prosecuted upon stale claims, they are to be construed in the spirit of their enactment.”

In *Broderick's Will*, 21 Wall., 503, the court says:

"Those who claim an interest in persons or things must be charged with the knowledge of their status and condition and of vicissitudes to which they are subject."

The said proposed amended petition is also subject to both a motion and to demurrer.

In the first place the court has decided that plaintiffs are not next of kin, and they are not in the class of the only heirs at law of Catherine M. Tuttle, deceased, and yet this is alleged in the amended petition; a motion would lie to strike it out. Nor does the proposed amended petition plead proper facts to show they are interested persons in said will. Plaintiffs plead conclusions instead of proper facts in that regard.

"The pleading must show that they have an interest. Merely pleading that they are heirs, is a mere conclusion and is not sufficient." 3 *Bates Pl. & Pr.*, 2963.

No facts are alleged to show their interest as heirs in ancestral property of which said decedent died seized.

No ancestor is even named, from whom they claim any such real estate came, and through whom they claim their interest.

A proper pleading would be required to show how they became such heirs. See long list of cases cited in 1 *Bates Pl. & Prac.*, 173. The facts necessary to be pleaded by reason of paragraph 5 of Section 8573, General Code, are not alleged in said proposed amended petition.

Hence this is not a proper pleading, and it is demurrable.

I am also of the opinion that the objection to the filing of the proposed amended petition on the ground of laches is well taken. Some seven months before this motion to amend was made by plaintiffs, a branch of this court, on a motion to dismiss, suggested to plaintiffs that if there was ancestral property, they should ask to amend, and then have the question of their right so to do determined. But plaintiffs did not do so.

"The right to amend a pleading must be claimed in opportune time. Unnecessary delay in applying for leave to amend may be

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a ground for the courts refusing, in the exercise of its discretion, to allow an amendment. * * * Laches will not be excused where the facts on which the proposed amendment is based must have been known to the pleader at the time he filed his original pleading. And a party may properly be denied permission to amend, where the necessity of the amendment was pointed out by the appellate court after a former trial but no attempt was made to amend until the cause again came on for trial. Courts as a rule will not allow an amendment setting up a new ground of recovery after the statute of limitations has run." 31 Cyc., 394-5-6.

I am of the opinion for the reasons above stated, that said motion of plaintiffs for leave to file an amended petition is not well taken and the same is overruled.

The application of defendants for judgment on the findings of December 4, 1913, dismissing the petition at costs of plaintiffs, is sustained.

**ENFORCEMENT OF INDIVIDUAL LIABILITY OF STOCKHOLDERS
IN A STATE BANK.**

Common Pleas Court of Greene County.

STATE, EX REL EMERY LATTANNER, v. THE OSBOEN BANK ET AL.

Decided, December 30, 1914.

*Banks and Banking—Self-Executing Provision as to Double Liability
of Stockholders—Enforcement of, by the Superintendent of Banks.*

1. The superintendent of banks is a proper party to enforce the individual liability of stockholders in any state bank taken possession of by him for liquidation.
2. The provisions of the Constitution adopted in 1912 providing for a double liability of the stockholders in banking companies are self-executing and do not require any legislation to make them effective.
3. The stockholders of a state bank organized in 1889 are liable to a double assessment for debts now existing which were made prior to November 23, 1903, and subsequent to January 14, 1913, but not for debts created and accruing between November 23, 1903, and January 1, 1913, when there was no constitutional provision for such liability.

KYLE, J.

This case is submitted upon demurrers by the several defendants to the petition.

The petition is an action by Emery Lattanner, as superintendent of banks, to enforce the double liability for the benefit of creditors.

The first ground for the demurrer suggested was that Emery Lattanner, as superintendent of banks, was not the proper party plaintiff to enforce this liability under the provisions of the law; that the closing up of the affairs of the bank are vested in a receiver duly appointed by the superintendent of banks, and that such receiver, or a creditor, should have been the plaintiff.

The method of conducting and winding up of the affairs of banks is purely statutory, and Section 742-2 prescribes the man-

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ner when they are taken possession of by the superintendent of banks, and provides that such superintendent "may, if necessary to pay the debts of such corporation, company, society or association, enforce the individual liability, if any, of the stockholders."

A special deputy superintendent may be appointed to close up any bank, and such appointee is not a receiver of such bank, but merely the agent of the superintendent of banks to aid in its liquidation and distribution. G. C., 742-2; O. L. 103, p. 530.

The superintendent of banks under G. C., 742-2 has clearly the right to enforce the double liability, and this suit is properly brought in the name of and on the relation of Emery Lattanner as superintendent of banks.

Another question presented and argued by counsel involves the effect, or effects, of the several constitutional amendments abolishing and providing for a double liability.

Without discussing the question I think that the provisions of the Constitution in that respect are self-executing and do not require any legislation to make them effective. *Willis v. Mahon*, 48 Min., 140; *Law et al v. People*, 87 Ill., 385; *Sheets Co. v. Neer Co.*, 4 N.P.(N.S.), 201; *Farmers Loan Co. v. Funk*, 49 Neb., 353.

It is contended by the plaintiffs that the constitutional amendment of 1912, effective on January 1st, 1913, being self-executing on that date, became effective and applied to existing corporations as well as those that might be subsequently incorporated or created.

The petition in this case alleges that the Osborn Bank was incorporated in 1889. At that time under the Constitution there was a double liability. In 1903 the Constitution was changed making a single liability, and the amendment of 1912 created a double liability as to banking companies.

The defendants claim they are not liable for any assessment as to debts created prior to January 1st, 1913, the date that the new amendment became effective, and they further claim that the petition does not on its face show that any of the alleged indebtedness accrued subsequent to January 1st, 1913, and therefore it states no cause of action against them.

The plaintiff claims that the amendment creating a double liability was self-executing on January 1st, 1913, and became effective as to existing banks and those that might be subsequently incorporated, and that as to existing banks such amendment was effective and created a double liability as to all indebtedness then outstanding regardless of the time the same was created or accrued.

In support of that contention plaintiff relies upon the case *In the Matter of Oliver Lee & Company's Bank*, 21 N. Y. Reports, Court of Appeals, page 9, the first syllabus of which holds that:

"Article VIII, Section 7 of the Constitution of 1846 subjecting the stockholders of banks to personal liability applies as well to banking corporations then existing as to those afterwards created."

A careful examination of this case does not support the contention of the plaintiff. In this case the corporation was formed in 1844, under the general banking act of 1838, which provided that the shareholders should not be individually liable for any contract of the association.

The amendment to the Constitution subjecting the stockholders to a personal liability was enacted in 1846, and became effective January 1st, 1850. The debt for which it was sought to enforce personal liability was created subsequent to January 1st, 1850, after the going into effect of the new provision of the Constitution.

In the opinion the court say, page 13:

"There is enough on the face of the provision to show that it was intended to apply to all banks of issue which should be in existence three years after the Constitution should take effect, without regard to the time when they were created. The individual responsibility was applied only to banks which should issue bank notes, or some kind of paper credits to circulate as money, after the first day of January, 1850, and only to such debts of those banks as should be contracted after that day. The delay was apparently afforded in order to enable the proprietors of existing banking institutions to determine whether they would

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remain banks of issue and assume the burden of individual liability, or avoid that consequence by winding up their affairs or confining themselves to other branches of banking."

In *Barnes v. Arnold*, 23 Misc., 208 (51 N. Y. Supplement, 1109), it was held that the banking act imposing a personal liability on stockholders in banking corporations had a prospective operation only.

In order to be consistent, if it is held that the constitutional amendment of 1912 imposes a double liability on the stockholders for all debts regardless of when they were contracted, it would have to be held that the amendment of 1903 discharged all double liability for all debts upon all corporations then existing.

I do not think the decisions of this state support such a contention. If it is conceded that the amendment of 1912, when it became effective, applied to existing corporations, it does not necessarily follow that it affected existing debts. Whether or not it might have applied to the stockholders of the Osborn Bank, if it had been incorporated after November 23, 1903, and during the period when there was no double liability, is not here determined. *Ireland v. Palestine*, 19 O. S., page 369.

Since the Osborn Bank was incorporated in 1889 at a time when there was a double liability I think the state had the power to legislate by amending the Constitution and relieve such liability as to debts thereafter incurred, and again re-enact and establish such liability. But such re-establishment of liability would not affect or give any right as to debts incurred while there was not any law in force providing for a double liability.

The assumption of liability is created at the time of the purchase of the stock and is a contractual liability. *Kulp v. Fleming*, 65 O. S., page 321.

The rights of a creditor as against the corporation and its stockholders are determined by the law at the time he creates the debt, and if there was no double liability at that time it could not be enlarged by subsequent legislation.

Kulp v. Flemming, 65 O. S., page 321, syllabus 2:

“The law of the state where a contract is executed and is to be performed enters into and becomes a part of the contract in the sense that its construction, validity and obligatory effect are to be controlled by that law.”

If the amendment of 1903 took away the right of double liability the amendment of 1912 would undoubtedly have the effect of restoring that double liability as to banks existing prior to 1903.

Therefore, I am of the opinion that the stockholders of the Osborn Bank are liable to a double assessment for debts now existing which were made prior to November 23, 1903, and subsequent to January 1st, 1913, but not for debts created and accruing between November 23, 1903, and January 1st, 1913.

With that view of the law, does the petition as against a demurrer sufficiently set forth indebtedness during the periods for which the stockholders might be liable in this action?

The petition alleges:

“That said bank was grossly insolvent upon the 18th day of June, 1913, and for several years prior thereto, the date being unknown to the plaintiff, during which period of insolvency the amount of the obligation of the creditors of this bank, for whose benefit this action is brought, accrued.”

Now, it could not be said that on the face of the petition that some of that indebtedness did not accrue between January 1st, and June 18th, 1913. The presumption would rather be that that was a part of the period during which a large sum of the obligations accrued, and that being the case on that ground the demurrers should not be sustained.

The defendants' procedure would rather be by way of motion to make more definite and certain. Hence, I am of the opinion that the demurrers, respectively, in this case should be overruled.

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**FAILURE TO SUPPORT A CLAIM OF MALPRACTICE
BY EVIDENCE.**

Common Pleas Court of Hamilton County.

FRED MOEHLMAN V. JOSEPH RANSOHOFF.

Decided, October Term, 1914.

Malpractice—To Support Claim of, Reliance Must be Had on the Testimony of Experts—No Guaranty Given of the Success of an Operation—Judgment of the Operator Must Control—Use of the "Lane Plate" in the Case of Fracture—Part of the Plate Removed by the Operator and the Remainder Chisled out—Some Months Later by Another Surgeon—Claim for Damages Can Not be Based on Failure of the Operation to Prove Completely Successful.

1. In cases where malpractice is charged the jury must be largely guided by the testimony of expert witnesses, and they can not disregard the testimony of such witnesses to the same extent as in the case of experts in other classes of cases.
2. A physician or surgeon does not insure the recovery of his patient, and all the law requires of him is ordinary professional skill and knowledge in the treatment of the cases which he undertakes; and where the plaintiff has suffered a broken arm and has sued the attending surgeon for malpractice, the mere fact that plaintiff has not recovered the full use of his arm and is somewhat crippled, does not warrant the conclusion that his condition in that respect is due to the negligence or want of skill of the surgeon.
3. Where the defendant is a surgeon of high professional standing, and experts who are called testify that in that class of cases the method to be pursued must be left entirely to the judgment of the operator and the circumstances of the particular case, and whether the proper method was followed in the case in hand they could not say, and the only evidence supporting the plaintiff's claim of unskillfulness or negligence is the fact that the recovery was less satisfactory than was hoped for, there is nothing to warrant the submission of the case to the jury.

Ruskin & Burnett, for the motion.

Robertson & Buchwalter and *H. N. Smith*, contra.

NIPPERT, J.

Opinion on motion for a new trial.

On November 13th, the court, upon motion of the defendant, directed the jury to return a verdict for the defendant in this action. The plaintiff, through his attorney, thereupon filed a motion for a new trial claiming that the court erred in directing a verdict as stated and in refusing to submit the case to the jury.

This is an action in which the plaintiff, Fred Moehlman, a carpenter of about fifty-eight years of age, filed his amended petition against Dr. Joseph Ransohoff, the defendant, setting out the following particulars, to-wit:

"That on the 12th day of April, 1912, he broke and fractured the bones of his right arm, and on the 20th day of April, 1912, the defendant holding himself out as a surgeon, plaintiff employed him, the said defendant, as such surgeon, to set said broken bones in their proper place and to attend on plaintiff until he should be cured.

"Said defendant thereupon entered upon said employment, but was negligent and unskillful in setting said bones in this, to-wit—that instead of making a proper and continuous connection between said broken bones, they were not set in their proper place, but were set together in such a way as to form an angle at the place of union of said bones, so that the bones could not and did not properly unite. Said defendant was negligent and unskillful in attending and dressing said arm, in this, to-wit—that at the place of union of said broken bones, defendant placed an iron Lane plate, which he fastened to the bones, on either side of said union, by iron screws, so as to hold the parts of said broken bones together, but because of said angle so formed and because of its weakness, said plate broke at one of the screws, and the flesh, tissue and bone of said arm, grew over and about the broken end of said plate. Said defendant permitted said iron plate to so remain for a long period of time, causing supuration and the discharge of pus and matter.

"Plaintiff further says that because of said negligence and want of skill, by reason of the acts above related, said arm became and is sore, maimed and permanently crippled, causing plaintiff much pain and suffering.

"Plaintiff further alleges that he is permanently injured and is crippled in said arm and said arm is now useless to him, all because of the negligence and unskillfulness of the defendant.

"By reason whereof said plaintiff has been unable to be employed at his usual vocation or at any vocation or employment since said operation, and has lost the wages that he would have

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earned and has been obliged to incur an expense of \$500 in endeavoring to be cured of said injury, the same having been aggravated and prolonged by said negligence and want of skill of the defendant.

“To plaintiff’s damage in all in the sum of fifteen thousand (\$15,000) dollars, for which he asks judgment.”

To this petition of plaintiff the defendant answers and says:

“That he is a surgeon, and was so at the time complained of, and that on or about the 20th day of April, 1912, he was called upon to examine and treat a fracture of the bones of the right arm of this plaintiff.

“Defendant denies that he was negligent or unskillful in setting the bones of said arm, and denies that he was negligent or unskillful in attending and dressing said arm, and further denies all carelessness and negligence on his part, and says that he at all times exercised due and proper care and skill, and gave the plaintiff due and proper care, and says that he is not responsible or to blame for any deformity or condition of the arm of the plaintiff.

“Further answering, the defendant denies each and every averment of fact contained in the amended petition of the plaintiff not herein expressly admitted.

“Wherefore, having fully answered herein, the defendant prays to be dismissed hence with his costs.”

The testimony showed that Moehlman, the plaintiff in this case, was badly injured on the afternoon of April 12, 1912, while in the employ of a local contractor, suffering a severe fracture of the bone in the upper right arm, called the humerus. In this action against Dr. Ransohoff we are called upon to pass upon alleged subsequent damage to Moehlman due to the alleged negligence of the doctor, who is charged by the plaintiff, not only with unskillfulness in setting of the bones, but also with unskillful treatment of the fracture after the same had been set.

If the plaintiff can establish, even by a scintilla of evidence, either of these two allegations of negligence, it would be the court’s duty to submit the case to the jury for its consideration, and if the plaintiff had established either of these two allegations of negligence by a preponderance of the evidence it would have been the duty of the jury to return a verdict in plaintiff’s favor.

Now the burden of proof is upon the plaintiff to show, first, that the surgeon was negligent and unskillful in the treatment which he gave the fractured arm, that is, that the surgeon failed to exercise the proper care in setting the bone; and, second, that the surgeon was negligent and unskillful in the performance of his duty towards the plaintiff in the care and attention bestowed upon him during the further treatment of the injury, and that in this respect he failed in the duty which a physician owes his patient and therefore was liable to the patient in damages.

This is a somewhat difficult case, in this respect, viz., that in complaints of this kind, that is, in cases where malpractice is charged, the jury must be largely guided by the testimony of expert witnesses and can not disregard the testimony of such experts in this class of cases the same as they might disregard expert testimony in other cases where the members of the jury themselves may have some peculiar knowledge of the things in controversy, for instance, as to land values, as to building contracts, condition of the weather, etc.; but in malpractice cases of this nature where it requires the study and knowledge of a science as complicated and as difficult as the science of medicine, the court and jury must necessarily be guided by the testimony of experts—experts in this special science. We can not be guided in our deliberations as to the treatment given to the patient by the opinion of laymen, because what may appear to a layman as the proper thing to do in the treatment of his injury may be the very thing which a doctor would abstain from doing, because it might endanger the life and health of the patient. In other words, when a patient places himself in the hands of a surgeon or doctor, he must rely on that doctor to use his knowledge and to bring his skill and experience and the best there is in him to bear upon the particular ailment or injury from which his patient is suffering and for the treatment of which the patient has engaged his expert services.

In the case at bar, the plaintiff, as stated above, did receive serious injury, a fracture of the upper right arm, which was aggravated by reason of the fact that this man had an unusually strong muscular development in that part of his arm, that is,

the biceps and triceps; the court can well see how that can easily be possible, for the plaintiff, being a carpenter, used tools which required the constant exercise of these muscles.

The defendant, who was called by the plaintiff as his first witness, stated that the nature of the fracture was such as is designated by the medical profession as a "flute" fracture of the humerus, while the muscular tension caused the fractured ends of the bone to override one another, thus protruding into the muscular tissue, that is, the muscles acted like a rubber band when the tension is released.

The testimony showed that immediately after the accident the injured man went to the Jewish Hospital, near his place of employment, and there "first aid" was administered by the interne and nurses in charge after which he was told to come back in a day or so for the purpose of having an X-Ray taken. X-Ray photographs were unknown a few years ago in the practice of medicine and surgery, but today they are regularly resorted to in order that the surgeon and the patient may have the benefit of the latest and best method offered by modern science in the treatment of injuries. The X-Ray plate proved the fracture to be of the nature testified to by the defendant on the witness stand. Thereupon, Dr. Ransohoff, being also surgeon in charge of the surgical ward at the Jewish Hospital, prescribed the treatment which, in his opinion, as an experienced practitioner, would offer the best chances for good results. The two fractured ends of the bone were to be brought in proper juxtaposition, so that in case of a heal the same would be as straight and perfect as the circumstances of the case would admit. In order to accomplish this end the surgeon resorted to the so-called "extension treatment" which was described to the jury as the placing of a weight upon the lower end of the fractured bone near the elbow joint and thereby gradually pulling the bones into position.

Unfortunately for the patient this treatment did not yield the desired result and an operation was decided upon by the defendant. The plaintiff was informed of this fact, and agreed and submitted to the operation, which was performed at the

Jewish Hospital about the fourth day after Dr. Ransohoff took charge of the case.

In the operation the surgeon resorted to the so-called "Lane plate" treatment, a treatment so named after the inventor of this process, Dr. Lane, of London. The purpose of this plate is to assist fractured bones to keep their proper position by means of the metal plate. The bones being injured and broken have not the same power of resistance against the powerful muscles as they would have in their normal state, so a metal plate is screwed into the bones for the purpose of assisting nature. It appears from the testimony that the bones being somewhat brittle the screws were not sufficient to hold the plate in the required position and the operator had to resort to the use of silver wire in binding the plate to the bone.

Now coming to the first charge of negligence upon which the plaintiff relies in his claim for damages against the defendant, to-wit: that these bones were not set in their proper place so that the bone would not and did not properly unite—there is no evidence in the record to show that the surgeon was unskillful in the performance of the operation itself, nor is there any evidence that the defendant failed to use a proper and recognized method of treatment in this case. The mere fact that the plaintiff has not the full use of his arm and that he is somewhat crippled, does not permit us to conclude that that was due to the negligence of the attending surgeon rather than to the misfortune of the plaintiff in meeting with an accident of as serious a nature as the evidence shows this to have been.

Before we could come to a conclusion, or before the jury would be permitted to deliberate upon the issues in this case, there must be some evidence as a basis for their deliberation, that is, some evidence of negligence.

A doctor or surgeon does not stand in the same relation to his patient as an accident or health insurance company, where the insurance company is liable as soon as the damage has been proven, for while it is easy to prove damage to a person's health, it does not necessarily follow that the doctor is responsible for such damage. He does not insure the recovery of his patient

from the wound or ailment for the treatment of which the patient engages the services of the doctor.

A surgeon is not a warrantor of cures. All that he is required to do, and all that the law requires of him, is to possess and exercise ordinary skill and knowledge in his profession in the treatment of every case which he assumes or undertakes to treat, and that he use reasonable and ordinary care and diligence in the exercise and application of his skill and knowledge to accomplish the purpose for which he is employed. And if he does not possess an ordinary degree of knowledge and skill, or is negligent and careless in his treatment of his patient, and an injury results to his patient by reason thereof, without any fault or negligence on part of the patient, then the surgeon would be liable in damages to his patient for the injury caused by his negligence and unskillfulness.

There is no question as to the superior skill and eminence of the defendant in the field of the science of surgery and medicine. So that, we are only called upon to determine whether he used his great skill and learning in the treatment of the plaintiff's injuries.

Now, what does the evidence show in the case at bar pertaining to the other particular allegation of negligence, to-wit: failure to exercise proper care and skill?

The plaintiff testified in support of his allegation of negligence against the doctor that after he recovered from the anaesthetic after the operation and while he was still "pretty sick" he looked at the wound through what he called a window, from which the bandage had slipped, exposing the wound beneath, and in answer to his attorney's question to describe what he saw when he looked in there, he answered as follows:

"A. I looked in there and I see some wire sticking out, two bunches of wires, one here and one about 3 inches up; they was twisted around, and one of them the lower one what was twisted all the twist was open.

"Q. Where were they twisted, Br. Moehlman? A. Right on top; they was overturned like you—

"Q. Over the skin, over the bandage, over the bone? A. Over the bone. I could look right on to the plate, right on to the plate, it was that much open, the cut.

"Q. What do you mean by the plate? A. I could see the center of the plate there in where the break was.

"Q. You mean the iron plate? A. The iron plate.

"Q. How long did you stay that way? A. Well, the nurse saw it first, one of the nurses. I saw it but I couldn't say much; then the nurse came to the bed and looked at it, she put the bandage on again, laid it on. I had some kind like a sand bag under me, on that arm, it fell over the back and got on to the floor and she took a different one and put it on.

"Q. What fell over the back and down on the floor. A. That bandage, that stuff what they had on my arm.

"Q. How long did it stay that way; how long did that wound stay the way you have described? A. It stayed that way until it started to heal a little afterwards.

"Q. And how long was that? A. I couldn't say that, it was a good while, but they called Dr. Ransohoff's attention to that. They said, 'We can't catch him today.' That was on Sunday

"Q. Who couldn't they catch that day? A. Dr. Ransohoff, they said he wouldn't come today, he aint going to come today. They said, 'Now we got to wait until Monday what we do,' they say, and they left it go, but Monday morning he came and looked at it, and I—

"Q. Let what go? A. They didn't—I don't know if they notified him or not, but he come Monday.

"Q. Notified him of what? A. That my arm was in bad condition that way.

"Q. That what was the matter with your arm? A. That cut was open.

"Q. Go on; when did you see Dr. Ransohoff? A. Saw him Monday morning then about half past 9 or nearly 10 o'clock, something around there; he came there with the head nurse; she was with him, come to my bed.

"Q. Yes. A. He says—I had tears in my eye and I didn't feel well, and I looked at him and I was afraid of the arm that way. So he says, 'What's the matter, Mr. Moehlman?' Well, I said, 'I believe the whole thing got loose some way or another.' He looked at it and he didn't say much. They was talking; he was talking to the nurse, but I didn't understand what he says, but he says, 'He is walled in, we got plaster all around him, that will hold all right. You are all right, Mr. Moehlman,' he says, 'You don't have to worry yourself about that; you are all right,' he says, 'your arm is all right.'

"Q. Did he make an examination of your arm? A. He just looked at it.

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“Q. Where did he stand when he looked at it? A. He was standing right alongside of me alongside of the bed, like the bed—I lay in the bed this way, he stood there and looked at it.

“Q. Did he pick your arm up? A. No.

“Q. Did he do anything to it? A. No, he says, ‘Can’t do nothing to it now,’ that’s what he said to the nurse, but he says, ‘He is walled in, he is all right, he can’t move.’

“Q. What did he say to the nurse? A. ‘He is walled in,’ he says.

“Q. Then what was next done to your arm; was anything done to it that day? A. Nothing at all.”

Giving the patient the benefit of the doubt and granting that his observation of the wound and his own conclusions are correct, namely, that that which he did see was the wire around the plate and that there was a break in the plate, and that he called the doctor’s attention to it, and that the doctor after looking at the wound and consulting with the nurse about it did not do anything further to it at that time, taking the plaintiff’s statement at its full value, even then this court can not say that there was any evidence of negligence against the doctor. The doctor himself testified that he was not absolutely satisfied with the result of this operation but that he thought best at that time not to disturb the wound any further.

But it is claimed by plaintiff that Dr. Ransohoff made *no* examination of the arm at the time when Moehlman was worried about it after the operation. This is not borne out by facts as shown by the evidence. Of course, Dr. Ransohoff did not put the patient back on the operating table, but he *did* examine the arm and wound. Moehlman himself admits it when he testifies that “He (Dr. Ransohoff) looked at it,” and said “He (Moehlman) is walled in, we got plaster all around him, that will hold all right. Can’t do nothing to it now. He is walled in, he is all right, he can’t move.”

Such testimony does not show any neglect on part of the surgeon, in fact it shows that he did examine it and used his own best judgment.

Who is to say in such case what course the surgeon should have pursued—the patient, the jury, or the attending physician?

If the patient or the jury are to be the final arbiters of the method of treatment that should be pursued in a given case, then our courts would be swamped with so-called "malpractice" suits against the medical profession, and the practice of surgery would become a most hazardous occupation.

The question here presented is, whether or not a reasonable, careful surgeon would have done as Dr. Ransohoff has done in this instance.

We have the testimony of the plaintiff's expert witnesses, to-wit: Dr. Echmann and Dr. Davis, both of whom testified that the method to be pursued in cases of this kind must be left entirely to the judgment of the operator, and whether the operator has pursued the correct method depends upon each particular case, and they could not say that under the circumstances Dr. Ransohoff pursued the wrong course either by inserting a Lane plate or in failing to disturb the bandage two days after the operation, considering all of the circumstances of the case, such as the condition of the patient, the condition of the wound, etc.

So, there is no evidence which would warrant the court to send this case to the jury upon the first allegation of negligence made against the doctor, for the jury will not be permitted to speculate upon the alleged negligence of the defendant, for negligence must be positively and affirmatively shown to have existed before the plaintiff will be entitled to recover.

Now as to the second allegation of negligence, to-wit: that the doctor failed to exercise proper care and skill in the further treatment of this wound and permitted the Lane plate to remain in the arm for such a length of time as to cause suppuration—the evidence of the plaintiff's own witnesses shows that it is customary to leave the Lane plate in the arm until it becomes incrustated and part of the arm-structure, and that it is only in such cases where after a certain length of time the treatment fails that the plate is removed. There is, however, some evidence that the plate broke and the patient charges the doctor with negligence in permitting the broken plate to remain in the wound for such a long period of time as "to cause a discharge of pus and matter."

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Again we must refer to the testimony of the surgeons. It appears from the evidence that Moehlman remained in the hospital about four weeks after the operation and that after that he was under the defendant's observation continually either at the Jewish Hospital or at the doctor's office and that about the middle of August a part of the Lane plate was removed. The testimony of all of the doctors who took the witness stand appears to be uncontradicted that in cases of this kind the treatment accorded to the patient, either by way of an operation or otherwise, must be left to the judgment of the operator or surgeon in charge, and no witness testified that the failure to remove the remaining part of the Lane plate could be considered negligence, for, as stated above, it is the usual custom to leave the plate in the arm. The testimony further showed that that part of the plate which the doctor left in the arm became so incrustated that when it was finally removed by Dr. Davis, in December, 1912, it had to be chiseled out of the bone before it could be removed.

The question that arises at this point is, whether or not Dr. Ransohoff was negligent in not removing the other part of the plate before the patient left his care.

There is no doubt that the wound and fracture did not heal as readily as both the patient and the doctor had hoped. Neither is there any doubt that some infection took place. But the court can not say from the evidence that the infection was due to any negligence on part of the doctor, nor is there any evidence to show that the infection was due to the treatment.

The testimony shows that after the August operation the patient came to Dr. Ransohoff's office every day and was treated either by the doctor or his partner, Dr. Louis Ransohoff. There is no evidence at all in the case to show that either of the two surgeons, or both of them, were careless or negligent in their treatment. There is no doubt that the plaintiff suffered excruciating pain, but that does not prove that the doctor was negligent. Very often human beings have to undergo great temporary suffering and pain in order that they might get permanent relief, and we deprecate the suffering of those who have

been injured, but you can not hold liable a doctor who appears in the role of a Good Samaritan, when the doctor is not responsible for the primary cause of the suffering—as in this instance the doctor was certainly not responsible for the unfortunate accident which befell his patient. The pain which the plaintiff was suffering at the hospital and while undergoing the treatment was rather the means to an end, and the doctor knew as well as the patient that his treatment entailed a great amount of pain and suffering, and while we may admit for the sake of argument that all of these facts existed, yet there is no evidence in this case which would show that the surgeon was careless or negligent.

We find that when Dr. Ransohoff returned from his vacation, in September, the plaintiff was still a regular caller at his office and a part of the Lane plate was still in the arm. The plaintiff testified that the doctor bandaged his arm and gave him treatment until about the last day of September, when some dispute arose between the surgeon and the patient and the patient was told in so many words that he could go and get another doctor if he was not satisfied with the work that Dr. Ransohoff was doing for him. This was sufficient notice to the patient to feel at liberty to consult other surgeons regarding his arm, but he really did not go to another doctor then, but he came back the very next day and received treatment from Dr. Louis Ransohoff, and it was a day after that that he visited Dr. Davis of Newport, Kentucky, discharging *ipso facto* Dr. Ransohoff.

Dr. Davis did not testify that he was going to operate on the arm at that time. He said he wanted to have an X-Ray taken, and on October 1st an X-Ray photograph was taken by Dr. Snow of Norwood, Ohio.

Now comes a period of doubt, a period of about ten weeks, where the evidence is very conflicting. At any rate, taking the plaintiff's own testimony, it may be concluded that neither Dr. Ransohoff or his son saw the patient after the patient had consulted with Dr. Davis. It may also be considered proven that the plaintiff did not visit Dr. Davis after October 7th until about December 14th, when Dr. Davis sent the patient to

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Bethesda Hospital for an operation, which was performed soon thereafter and the remaining part of the plate was removed from the arm. Dr. Davis testified that the arm was then (December 14th) badly infected and he removed the Lane plate by "chiseling" through the bone.

There is very little evidence before the court as to what Moehlman was doing between October 1st and December 14th. He certainly was not in charge of Dr. Ransohoff, the man whom he now desires to hold responsible for not removing the plate. We do not know when or how soon Dr. Ransohoff would have removed the plate had the patient remained under his care, or whether he would have removed the plate at all.

The fact remains that there is nothing in the evidence which would warrant this court to submit this case to the jury, as there is *no* evidence supporting plaintiff's claim of negligence against the physician.

Dr. Eckman of Covington, Kentucky, one of the experts called on behalf of the plaintiff, said: "We would keep that plate in the arm in most cases, except in case of infection, and whether the plate should have been removed by Dr. Ransohoff depends entirely upon the condition of the patient, and no one is a better judge of that than the doctor in charge."

The attention of the court has been called by the attorneys for plaintiff to the recent decision of our Supreme Court in *Gibbs v. Village of Girard*, 88 Ohio St., 34, in which the court re-affirm the principle of the "scintilla rule" in Ohio, which means in effect that no matter how slight the evidence may have been to support plaintiff's contention, the case must be submitted to the jury, for it is the inalienable right of the party to have the weight and sufficiency of his evidence passed upon by the jury, a right which he can not be deprived of by the court.

The court does not differ from learned counsel on this proposition of law; but it is also undisputed that the burden is upon plaintiff to support, by some evidence, each fact indispensable to the right of action, and if he fails to do so it becomes the *duty* of the court to arrest his case from further consideration of the jury and direct a verdict for the defendant.

The plaintiff in this case has failed to sustain, in the opinion of this court, the allegations of negligence set out in his petition by any evidence, and the motion for a new trial must therefore be overruled.

SUMMONS IN DIVORCE CASES.

Common Pleas Court of Cuyahoga County.

MARY R. MILLIS v. JOHN MILLIS.

Decided, November 2, 1914.

Divorce and Alimony—Defendant Out of the State by Compulsion—Must be Served as a Resident of the State—Strict Construction of the Statute Required—Faulty Affidavit for Service by Publication—Residence and Abode.

1. Extreme cruelty and gross neglect of duty are separate and distinct grounds for divorce, and where acts are complained of which might constitute extreme cruelty under some circumstances and gross neglect of duty under other circumstances, good pleading requires that it be stated on which ground a divorce is asked.
2. Where an affidavit for publication goes beyond the requirement of the statute "that service of summons can not be made within the state upon the defendant sought to be served," and undertakes to give the reason why service can not be made within the state, and the reason given is that the defendant resides on a certain street of a city in another state, it does not necessarily follow that the affidavit conforms with the requirements of the statute, inasmuch as the reason given is not conclusive that service can not be had upon him in this state.
3. Place of residence is a matter of choice, and where an army officer has indicated his choice by purchasing property within the state and establishing his home therein which he continues to maintain, he can not be served by publication, notwithstanding his abode is by compulsion at some army post in another state or country where he has been stationed by the Government.

Geier, Farrell & Edwards, for plaintiff.

Henry & McGraw, contra.

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FORAN, J.

The plaintiff, Mary R. Millis, on November 22, 1913, filed a petition in the court of common pleas of this county praying for divorce against the defendant, John Millis. The usual precept was attached to the petition, and the return of the sheriff made December 1, 1913, and a subsequent return on an alias precept made April 27, 1914, read, "The within named defendant, John Millis, not found in my county." On April 12, 1914, the plaintiff filed an affidavit for publication which reads as follows, omitting the caption and jurat:

"Mary R. Millis, being first duly sworn, says that she is the plaintiff in the above entitled action; that service of summons can not be made upon the defendant in the state of Ohio, for the reason that the defendant resides at 284 Thomas street, Newport, Rhode Island, and that it is one of those cases provided for in Section 11984 and 11292 of the General Code."

The proof of publication was filed September 16, 1914, and seems to be in legal form.

On September 3, 1914, the defendant filed a motion to quash, set aside, and hold for naught, the writ of service of summons by publication, the defendant only appearing for the purposes of the motion, the motion averring that the defendant is and at all times since the commencement of the action has been a resident of Cuyahoga county. In the affidavit in support of the motion to quash, defendant says that he is and has been for many years past a Colonel of Engineers in the United States Army; that he was formerly stationed in the city of Cleveland, Cuyahoga county, Ohio, but was subsequently transferred by order of the War Department to Newport, Rhode Island, where he is now in charge of the United States Engineers' office of that city. Affiant says that during the past eight or ten months he has been in Cleveland, Ohio, several times on duty as a member of the United States Engineering Board, and expects to be in Cleveland from time to time hereafter in the same behalf; and further says that while he was officially stationed in Cleveland, Ohio, he purchased a house and lot in East Cleveland, Cuyahoga county, Ohio, and there dwelt with his family continuously while he was so stationed in Cleveland, and that said house in East Cleveland,

Cuyahoga county, Ohio, is his home, and that the same has at no time been rented or occupied for any other purpose than that of his family residence; that said premises are in charge of a care-taker, and all of the defendant's books, furniture, and household effects are still in said house; that the only effects he has taken from said house are his necessary wearing apparel, and that when he was in Cleveland he regularly remained and slept in said house, with the exception of a few nights when, on account of early departure from the city, it was more convenient to stop at a hotel; that said home in East Cleveland, Ohio, has never been offered for sale or rent, but was ready for occupancy by the defendant and the members of his family, including the plaintiff, whenever any of them may have desired to occupy it; that his present official station is at Newport, Rhode Island, and that he is so stationed at said Newport by assignment regularly made by the War Department, and that such assignment is temporary and may be changed at any moment; that while discharging his duties at Newport, Rhode Island, he has occupied rooms there by the month, and takes his meals at a neighboring boarding house; that he has furnished no establishment that could in any way be called or considered a permanent residence at Newport, Rhode Island; and that he regards Cuyahoga county, Ohio, as his permanent home and place of residence.

The question presented for the consideration of the court is, whether under the circumstances the motion to quash ought to be granted. Elaborate briefs have been filed upon both sides, and much learning and ingenuity have been displayed as to what is meant by the word domicile or residence. The question is decidedly novel and new, and has never been decided so far as the court is able to learn. We think it would be a waste of time to attempt to distinguish the cases cited by learned counsel, and deem it necessary only to consider the matter in a broad and general way. It may be said *in limine* that, in this county at least, great laxity has arisen with respect not only to divorce petitions, but with respect to service upon defendants. One of the rules of this court provides as follows:

"The judges shall carefully examine all petitions and cross-petitions brought before them in divorce cases, and determine whether a cause of action is stated therein."

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Acting upon this rule, the court has examined the petition of the plaintiff, and is clearly of the opinion that it does not state a cause of action.

Section 11979, General Code, enumerates ten distinct causes for which divorce or alimony may be granted. Among these are "extreme cruelty, or any gross neglect of duty," but these are two separate and distinct causes for divorce, and ought not to be confounded with each other.

In the petition set out *in extenso*, are many acts of conduct on the part of the defendant, of which the plaintiff complains. These acts of conduct might, under certain circumstances, amount to a gross neglect of duty, or they might amount to extreme cruelty, but the pleader does not state upon which ground the plaintiff is seeking a divorce, nor is the defendant notified whether plaintiff seeks a divorce because of extreme cruelty, or because of gross neglect of duty. In this respect the petition does not fulfill the requirements of a good pleading.

Section 11293, General Code, provides:

"Before service by publication can be made, an affidavit must be filed that service of summons can not be made within this state on the defendant sought to be served, and that the case is one of those mentioned in the next preceding section."

Section 11984 provides:

"If the defendant is not a resident of this state, or his residence is unknown, notice of the pendency of the action must be given by publication as in other cases."

It will be noticed that in the affidavit for publication it is claimed that, "Service of summons can not be made upon the defendant within the state of Ohio, for the reason that the defendant resides at 284 Thomas street, Newport, Rhode Island." If the affidavit simply followed the statute, "that service of summons can not be made within this state upon the defendant sought to be served," no objection could be found to the form of the affidavit: but when the affidavit undertakes to give the reason why service can not be made within the state of Ohio, and the reason is stated as being that the defendant resides at 284

Thomas street, Newport, Rhode Island, it does not necessarily follow that the affidavit conforms with the requirements of the statute. The mere fact that the defendant resides at 284 Thomas street, Newport, Rhode Island, is not conclusive that service may not be had upon him in the state of Ohio, and this becomes quite evident from the affidavit of the defendant that he is frequently in the city of Cleveland, Ohio, where service may be had upon him. We therefore hold that the affidavit is insufficient, and the service ought to be quashed for that reason if for no other.

But the main objection made by the defendant to the service is that his legal residence is now in Cuyahoga county, Ohio, and that he has no legal residence in Rhode Island.

There are many reasons why the statute relating to divorce should be strictly construed. Even under those conditions where marriage has been deemed to be the acquisition by the husband of property in the wife, or in jurisdictions where it has been regarded as a mere agreement between persons capable of entering into and dissolving the marriage contract, it is frequently found that marriage has been held dissoluble at the will of the husband, or by agreement between the parties; but it must be conceded that even in these cases, or under these circumstances, the interest of the whole community, that is, of the state, in the purity of the marriage relation, as well as in the pecuniary bearing of this particular kind of contract on the condition or status of the children, the well-being of society requires the imposition of restrictions and the attachment of conditions to the termination of the obligation consequent on a marriage legally contracted.

A history of the family relation upon this question might be illuminating, but we only need refer to one particular phase of that history. Exogamy, or the unwritten law which makes it incest, and which made it formerly in some jurisdictions a capital offense, to marry within certain degrees of kinship, is one of the indications pointing to the evolution of the family as it existed in savage communities to the present day. Exogamy itself existed among the savage people. The purity of the race demanded it. The evils of promiscuous intercourse could not forever escape human observation. The exogamous survived, while

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the promiscuous perished. This is only one of the many ramifications historically considered that enter into the marriage relation, and experience has demonstrated that today the family is the social human integer and the best interests of society demand that family ties be not terminated or dissolved for trivial reasons or causes. Although we are consciously impressed with the idea that the family originates in marriage, it is nevertheless unquestionably true, as anthropologists have pointed out, that marriage is rooted in the family. It is also true that the more complete the harmony and community of life between husband and wife, the larger the value to society of the family in its separate units and as a complete whole. The evolution of the family is the evolution of society, and the monogamous marriage marks the highest stage and phase in this evolution from the physical or unregulated sex relationship to the era of the husband's proprietary interest in his wife or wives, through polygamy, concubinage, and polyandry, and the final or monogamous stage, where the relation of husband and wife approximates that of two persons wholly and entirely equal before the law. While it may be said that marriage is a civil contract, jurists have always, and of social necessity must recognize its isolation from all other kinds of contracts, and deal with it really as a legal status between the husband and the wife. In contracts generally, the parties may of right define their rights and duties as they please; that is, parties may contract in any way they see fit so long as their contracts are not in contravention of law or public policy. In marriages, however, every resulting right and duty is absolutely fixed by the laws of the state, and these laws are strictly construed in favor of the indissolubility and integrity of the contractual relation known as the marriage contract.

The case of *Harter v. Harter*, 5 O., 318, is a case in point. In that case one of the parties lived in Delaware county, and the other in Perry county in this state. The petition was filed in Delaware county and summons was issued directed to the sheriff of Perry county, which was by him duly served upon the defendant and returned, but the law at that time provided or required that in all cases where the application is made for divorce and

the party defending resides in the county where application is made, personal service shall be made by summons and by a copy of the petition, but in case the defendant does not reside in the county, then publication shall be given in one of the newspapers in the state for three months. This is practically the second section of the act concerning divorce and alimony passed January 7, 1824 (29 O. L., 431). A divorce was granted in the case, but the Supreme Court reversed the finding of the lower court, and Hitchcock, J., among other things said:

"We have ever been disposed to give a strict construction to the law, and not to hear a case unless the applicant brings him or herself within both the letter and spirit of the statute."

In *Lewis v. Lewis*, 1 Iddings T. R. D., 11, it was held that:

"Service in a divorce case by voluntarily entering appearance by the defendant is not good. Such service is collusive upon its face, and against public policy. The manner of service pointed out by the statute must be followed."

In *Smith v. Smith*, Wright's Reports, 643, it was held:

"When a bill for divorce is amended, there must be service. The appearance and waiver will not be received."

In other words, a party may not bring an action for divorce, say, for gross neglect of duty, and then amend the petition and claim a divorce without service on the ground of extreme cruelty or any other statutory ground; and if such amendment is made, service must be had upon the petition as amended.

We think these citations sufficient to show what the trend of opinion has been in Ohio. As has been already indicated, we do not believe that any good purpose would be served by attempting to distinguish or analyze the various cases cited by counsel. It may be said in a general way that the law of the United States, as well as of England, requires that a man shall always have a domicile, and that he shall never have more than one domicile.

In *Udny v. Udny*, 1 House of Lords, Scottish Appeals, it was said:

"A settled principle is, that no man shall be without a domicile; and to secure this end, the law attributes to every individ-

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ual as soon as he is born, the domicile of his father if the child be legitimate, and the domicile of the mother if the child be illegitimate."

This is called the domicile of origin, and, of course, is involuntary. It is the creation of law and not of the party; in other words, it fixes the status of each individual, and determines his nationality. There is, however, a domicile of choice which is the creation of the party; and when such domicile of choice is created, the domicile of origin is in abeyance, but is not absolutely extinguished or obliterated; and if the domicile of choice, in the case of a single man, be terminated, the domicile of origin may be revived. Intention is a necessary element in domicile of choice; indeed it is the element that must prevail in determining whether a domicile is one of choice or not. Abode has generally been held, and is now understood to be the place where a man lives with his family and sleeps at night. See *R. v. Hammon*, 17 Q. B., 772.

Residence, in the ordinary meaning of the term, is the place where an individual eats, drinks and sleeps, or where his family or his servants eat, drink and sleep. See *R. v. North Curry*, 4 B. & C., 959.

If a man's place of residence is not where he eats, drinks, and sleeps with his family, we think it must be said that the place where he then abides is not his legal residence, but his abode for the time being, and his residence must be said to be where his servants eat, drink, and sleep, or where his family eats, drinks and sleeps. We are clearly of the opinion that under the divorce statutes, where the question of residence is involved and service can not be had within the state of Ohio, it means that the party has separated from his family or from the spouse, and that this separation is one of choice. In other words, if a man separates from his wife and family and leaves the state, he does so voluntarily, and under such circumstances service may be had upon him by publication as in other cases. It is very pertinently said by counsel for defendant in this case that if the defendant, Colonel Millis, was ordered on duty to the Philippine Islands by the Government of the United States, it would be manifestly

unjust and clearly illegal to permit the wife to obtain a divorce from him while his abode was in the Philippine Islands, he being there upon duty and not there from choice. Or, take another instance; suppose a man is sent as consul by the United States to Hong Kong, China, or some other distant city, and does not find it convenient to take his family with him, can it be said that while he is at his post on duty that his wife may bring an action for divorce and obtain service by publication for the reason that service by summons can not be had upon him in the state of Ohio? Or the illustration might be carried even further. A man may be in the contracting business, and while his main office and principal place of business may be in Cleveland, Ohio, he may have a contract to do work in Seattle or San Francisco, and the duties incident to this contract may require his presence there continuously for a year or more. Under such circumstances can it be said that the wife may file a petition for divorce and obtain service by publication simply because service by summons could not be served upon the defendant in Ohio? In the cases indicated it might not be convenient, indeed it might be impossible, even if the summons and a copy of the petition were served upon the defendant, to return to his home to make his defense. This is especially true with respect to a United States Army officer. He would have to obtain leave of absence, which is not always granted for the asking, and if a United States Army officer was in a far distant country and a state of war existed, a leave of absence would not be granted under these circumstances, and the same might be said with respect to a consul who was several thousand miles from home. The situation might be such that the government could not grant a leave of absence at the time even if one was asked; or even in the case of a man doing contract work in a distant part of the country, the work might be in such condition at the time he received a copy of the summons that to then leave it would spell ruin and destruction for him.

We think the answer to these questions is conclusive upon this proposition, and we therefore unhesitatingly hold that the legal residence of the defendant, Colonel Millis, is now in Cuyahoga county, Ohio, and that his abode in Newport, Rhode Island,

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is not one of choice but is forced upon him by the exigencies of his profession, and it was never contemplated by the Legislature of the state that service in a divorce petition could be had upon him, under these circumstances, by publication.

It may be true that if the plaintiff, Mary R. Millis, really has good grounds for divorce, or good cause for her action, it would be a hardship to say that she could not have service by publication, as the temptation on the part of the defendant to keep out of Ohio might be so great as to prevent him from ever returning to his home, but the trouble is with the Legislature. In other words, the Legislature of the state of Ohio has not provided for service in a case of this kind, and the interest of the state in the integrity of the family relation, the property and pecuniary interests of children are of such moment that it must be held that the law relating to service in divorce cases must of necessity be strictly construed, and the party seeking a divorce must, as Judge Hitchcock said, "bring him or herself within both the letter and the spirit of the statute."

For these reasons the motion will be granted, and the service quashed.

ASSESSMENTS FOR PARTITION FENCES.

Common Pleas Court of Clark County.

WILLIAM M. SMITH ET AL V. J. M. PIERCE, AUDITOR, ET AL.

Decided, September, 1914.

Partition Fences—Validity of Assessment Against Owner of Right-of-way—For Constructing and Maintaining One-half of the Fence on Each Side.

The owner of a right-of-way used as a farm outlet is required to construct and maintain one-half of the fence on each side of his right-of-way, irrespective of whether a complete enclosure is made at the end openings by gates or otherwise, and a valid assessment may be made for construction of such fence.

McCormick & Hudson, for plaintiffs.

C. E. Ballard, Prosecuting Attorney, and *Wm. M. Rockel*,
contra.

HAGAN, J.

This case was submitted to the court upon the pleadings and upon evidence and the briefs of counsel. Plaintiffs in their amended petition aver that they are the owners of a tract of real estate of four acres off the west end of an eight-acre tract deeded to Sophia and Catherine Frock by their father, Peter Frock, Sr., by deed of February 9, 1885, said real estate being deeded to the plaintiffs by C. W. Minnich, with a right-of-way from the said premises to the Pole Cat road being the same right-of-way reserved in the deed of J. B. Crain, executor of Peter Frock, deceased, to Evan Creel, recorded in Volume 103, page 498, of the deed records of this county for the use and benefit of eight acres of land of which said four acres form the west end; that the said auditor has without authority of law directed the said treasurer to charge and collect from the plaintiffs upon the said real estate owned by them the sum of \$56.60 as a special assessment for the costs of constructing an alleged

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partition fence claimed to have been constructed by the township trustees of Mad River township, Clark county, Ohio, between the lands of the "Athy heirs" and the plaintiffs.

Plaintiffs further claim that the said alleged partition fence was built under a contract made by said township trustees which was illegal in that it provided for the use of a barbed wire to be placed on said alleged partition fence less than forty-eight inches above the ground; that the plaintiffs were not required to build or maintain the fence or any portion thereof in the place where the said alleged partition fence was constructed and that said board of trustees was therefore without authority of law to order or contract or construct said alleged partition fence where the same was placed.

The petition further alleges that there was an error in the certification of the said lands in the matter of the description; that said alleged partition fence did not complete the inclosure either of plaintiff's land or of the land of any other person or persons; that said alleged partition fence was not constructed between the land of the plaintiffs and any other person or persons and was not in fact a partition fence.

Then follows an averment that plaintiffs offered to pay their regular taxes to the said treasurer but he refused to receive the same unless they would also pay the above assessment and that the treasurer now threatens to and unless restrained by the order of the court will enforce the collection of said assessment with penalties thereon and will sell said property at tax sale or distrain the plaintiffs if said assessment is not paid.

The prayer of the petition is for a perpetual injunction against the said officers to prevent the collection of said special assessment.

Upon the filing of the petition a temporary injunction was allowed and the question now is whether the same should be made permanent.

On the hearing it was agreed between the parties that the statutory proceedings on the part of the township trustees, the certification of the assessment to the auditor and the placing of the same upon the duplicate were according to law, the plaintiff-

iffs waiving any slight irregularities that they might otherwise attempt to show, and two matters remain for determination, viz.:

First, was said fence constructed in violation of Section 5909, General Code of Ohio, which provides in substance that no person shall cause to be constructed a fence from barbed wire unless written consent of the adjoining owner be first obtained, but that such consent shall not be necessary for the use of one or two barbed wires, provided that neither thereof is less than forty-eight inches from the ground and is placed on top of the fence other than a barbed wire fence?

Second, did said township trustees have the legal right to cause the construction of said fence as a partition fence?

In regard to the first question, the testimony given by the plaintiffs as to the height of the fence is quite meager and indefinite, while that offered on behalf of the defendants is not in all respects consistent. The surface of the ground along the line of the fence appears to be somewhat uneven which may account to some extent for the variations in the measurements of the height of the fence. The fence was constructed of woven wire except a single strand at the top thereof which consists of barbed wire. Taking the testimony as a whole the court finds that the height of the fence to the top wire ranged from forty-eight to fifty-two inches. The width of the top wire was, as one witness said, about equal to that of an ordinary lead pencil—another one-quarter of an inch. It appears, therefore, that the fence in this respect was constructed in substantial conformity to the statute. So far as the testimony of the plaintiffs is concerned they wholly fail to maintain the allegations of their petition in this respect.

As to the second question above stated its consideration may be properly divided into two parts:

(a) That the said alleged partition fence was not constructed on the line of the premises of the respective parties, and

(b) That it did not complete the enclosure of the lands of the plaintiffs.

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It is claimed that said fence was not constructed on the line of the right-of-way of plaintiffs and the adjoining lands of the Athy heirs. The original grant of that way which was afterwards conveyed to the plaintiffs did not define the width of the proposed way. It was bounded on the south side by a fence dividing it from what may be referred to in the testimony as the Snyder lands. As it existed from the time of the construction of said alleged partition fence it is substantially one rod in width and the same has been used at various points of the way by the plaintiffs to the full extent of the width. No objection was made by the plaintiffs to the width of the right-of-way at the time the partition fence was located and the court therefore thinks that the parties have practically given a construction of the width by their own acts and that therefore the fence may be justly treated as a line fence between the said right-of-way and the adjoining lands of the Athy heirs. The court does not therefore think the contention of the plaintiffs in this respect is maintained.

The principal argument made by counsel for plaintiffs is on the proposition that said fence is not a partition fence within the provisions of the statutes of Ohio for the reason that it does not complete any enclosure either of the plaintiffs' land or of the lands of any other persons. We may dismiss this argument as to the claim that the partition fence does not make an enclosure of lands of other persons, as this is immaterial under the statutes of Ohio. If it were necessary, however, to decide on this point the court finds that this claim is not sustained by the evidence as to the adjoining lands of the Athy heirs by reason of the fact that said partition fence enclosed said right-of-way at all points, at the time of the construction thereof and completed the enclosure, although portions of the fence along the public road on the lands of the Athy heirs may at the time of the construction of said fence have been out of repair.

At the time of the construction of the fence the fee of said right-of-way and for some time prior thereto had been in the Athy heirs and they had joined the owner of the lands

south of said right-of-way in constructing a partition fence between said lands and the right-of-way, which partition fence was in existence and has ever since remained in existence except that a small part thereof, not exceeding probably 150 feet, next to the public road into which said way opens, has become out of repair and fallen down, the testimony being conflicting as to just what the condition of this part of the fence was at the time the said partition fence was constructed. The right-of-way is about eighty rods in length and this small part in disrepair can easily be repaired at small cost.

Before the construction of said partition fence the Athy heirs had laid out a tract of about sixteen acres of land immediately adjoining the right-of-way on the north into several tracts for the purposes of cultivation and pasturage, with fences running east and west to said right-of-way and in order to complete the several enclosures they had constructed several gates or bars across the right-of-way, but the plaintiffs by opening the same could pass over the right-of-way to and from their said premises. The court finds that the plaintiff, William M. Smith, complained that on account of being compelled to open and close said gates or bars he was greatly inconvenienced, and to obviate this he requested that they should be removed and a fence constructed between said right-of-way and the said land of the Athy heirs, the plaintiffs claiming that there had been an agreement between them and the Athy heirs by which there was to be a gate at the terminus of the said right-of-way at the Pole Cat road, a public highway, and another gate at the terminus of said right-of-way at said premises of plaintiffs, but whatever the arrangement was on this point it seems to have been superseded by the arrangement that there should be a fence along the north side of the right-of-way between it and the Athy lands, which was to take the place of said bars or gates.

In the grant of the right-of-way there is no provision as to whether gates or bars may be maintained at the termini thereof and in such case the law appears to be that the owner of the fee may lawfully erect gates or bars at the termini of the

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way either where it enters the highway or at the opposite end. *Methodist Prot. Church v. Laws*, 7 C. C., 211.

The court in that case held that apparently the same principle which would enable the owner of the fee to do this would also authorize him to erect gates or bars not only at the termini of the way but also wherever it passes through his adjoining lands and separated from each other by a fence and in every case where such right is questioned the point would be to the jury whether in the particular circumstances it is reasonable to have the number of gates and bars on such way as appear in the particular case. The Supreme Court of Ohio affirmed this case in *State v. Taylor*, 55 Ohio St., 62. See, also, *Gibbons v. Ebbing*, 70 Ohio St., 298.

It does not appear that the exercise of said right by the Athy heirs, the owners of the fee, in this case was unreasonable in the circumstances.

Now to relieve himself from the burden which these gates and bars imposed upon him in the way of opening and shutting the same, the plaintiff, William M. Smith, requested the construction of said fence between said right-of-way and the lands of the Athy heirs, which was accordingly done by means of said proceeding had by and before said township trustees.

It is in evidence that the plaintiffs passed in and out over said right-of-way with vehicles and that their friends on numerous occasions had made use of the said right-of-way in the same manner and also that he took his live stock in and out of the same. Certainly the use of the way for the purpose of taking in and out live stock was beneficial to the plaintiffs. So far as the disrepair of the line of fence on the south side thereof was concerned the plaintiffs could easily have remedied the same at slight cost even if it was in such disrepair as not to be a good fence to keep out stock at the time of the construction of the said partition fence. Moreover the Athy heirs or their assignees would have the right to make use of the adjoining land for pasturage purposes and a fence between the right-of-way and such pasturage lands would bar stock from interfering with the use by the plaintiffs of said right-of-way which in the

case of breechy and vicious stock might be called a valuable protection.

The evidence does not show that at the time of the construction of said partition fence there was a gate or bar at the terminus of said right-of-way where it opens into said Pole Cat road nor has there at any time since been a gate or bars at that point.

Counsel for plaintiffs cite the case of *Kingman v. Williams*, 50 Ohio St., 722, the syllabus of which is:

“One adjoining proprietor can compel another to contribute to the expense of building or maintaining a partition fence between their lands, only, when the partition fence completes an enclosure which contains no other lands than those of the latter.”

It appears by the statement of the facts in the case that the township trustees in that case made an assignment of the fence to be constructed in the year 1887 under the law contained in Sections 4239, 4240, 4241 and 4242, Revised Statutes (Sections 5908 to 5912, General Code). An examination of those sections of the Revised Statutes does not disclose any reference to rights-of-way for farm outlets except as appears in Section 4241, Revised Statutes, which provides that in case of narrow strips of land not more than two rods in width between adjoining farms of other persons while used and occupied by such owners for the purpose of farm outlets to and from public highways, the owners thereof, unless otherwise provided for shall keep and maintain in good repair one-half of such partition fence on either side of said farm outlet or private right-of-way.

This was the state of the law when the case of *Kingman v. Williams*, *supra*, was decided but no point arose as to such rights-of-way, the gist of the case being that where the alleged partition fence did not complete a separate enclosure for lands of an adjoining owner, but completed an enclosure for the lands of such owner and the owner of an adjoining tract not bounded by the partition fence, no part of the cost of constructing the partition fence could be collected from the adjoining

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owner along whose lands the partition fence had been constructed.

By Section 5919, General Code, it is provided that the term "owner" shall apply to the owner of land in fee simple, of estates for life or of rights-of-way while used by the owners thereof as farm outlets. Originally this section may be found in 98 O. L., 149.

The case of the *Alma Coul Co. v. Cozad*, 79 Ohio St., 348, is also cited by counsel for plaintiffs. This case arose under Section 4239, Revised Statutes (Section 5908, General Code), passed April 18, 1904 (97 O. L., 138), which provided that the owners of adjoining lands shall build, keep up and maintain in good repair all partition fences between them in equal shares unless otherwise agreed upon between them, and by Sections 4242 and 4243, Revised Statutes (Sections 5910 to 5915, General Code), it was provided that if any party neglects to build or repair a partition fence, or the portion thereof which he ought to build or maintain, proceedings may be had before the township trustees to secure the construction of the partition fence and the collection of the cost thereof and the share of the resisting proprietor. The court said of these provisions of the Revised Statutes:

"The act contains no definition of a partition fence which would necessarily include a fence constructed and maintained by one proprietor for his sole use and not used by the other in the enclosure of his lands."

It appeared in that case that the lands of the plaintiff against which it was sought to make and collect an assessment for the partition fence were all wild, uncultivated and unfenced; that he had no desire or intention to improve, fence or cultivate any portion thereof and that said fence was of no value or benefit to it whatever. The Supreme Court said that upon this state of facts it must hold that any construction of said Revised Statutes which would justify the collection of such an assessment would require the court to hold statutes to that extent unconstitutional and that therefore the court would not

so construe such statutes and held that the assessment could not be collected. The court said however at page 356:

“A special assessment can be made only in consideration of a special benefit conferred upon the owner of the property assessed or upon the property itself.”

Now we have already seen in the consideration of the facts in this case that the partition fence here in controversy was constructed at the request of the plaintiffs to relieve them of the burden of opening and closing gates upon their right-of-way and that such fence is quite beneficial to them in the respects already pointed out. The plaintiffs can easily make a complete enclosure of said right-of-way by putting a gate at the terminus thereof where it opens upon the Pole Cat road and the owners of the land abutting on the north side of the right-of-way have the right to cause such gate to be constructed.

The question made here is a new one, but the court believes that it was the design of the Legislature to provide for the construction of partition fences along rights-of-way irrespective of whether a complete enclosure thereof is made at the termini and that it was the legislative intention that a partition fence could be constructed in such a case and an assessment made upon the owner of the right-of-way because it would be in the nature of things beneficial to him.

In consideration of the facts found by the court and the rules of law which have been stated the court is of the opinion that the plaintiffs have not maintained their action in this case and therefore the temporary order of injunction will be dissolved and the petition of the plaintiffs dismissed.

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**DELIVERY OF PROOFS OF LOSS TO GENERAL AGENT IS
DELIVERY TO THE COMPANY.**

Superior Court of Cincinnati.

ALBERT S. WOOD, EXECUTOR OF THE ESTATE OF ISABELLA F.
WOOD, v. THE CONNECTICUT FIRE INSURANCE COMPANY.

Decided, December, 1913.

Fire Insurance—Interest of Insured Not Changed—By Transfer of Title to Trustee for Sole Benefit of Insured—Filing of Proofs of Loss—Time Limits for so Doing and for Making Payment Under the Policy.

1. Where a policy of fire insurance provides that the entire policy shall be void if the interest of the insured be other than unconditional and sole ownership, a transfer of the legal title in the property covered by the policy to a trustee for the sole benefit of the insured so that if the property was destroyed the entire loss would fall on the insured, does not change the interest of the insured so as to render the policy void.
2. Where a policy of fire insurance requires proofs of loss to be rendered to the company, an agent who is authorized to solicit fire insurance, to issue and countersign policies, and to collect premiums, is a general agent representing the company for the purpose of receiving or being served with proofs of loss in case of fire, and the delivery of proofs of loss to such agent is as a matter of law a delivery to the company.
3. A clause in a New York standard form policy of fire insurance, providing that proofs of loss shall be rendered to the company within sixty days after the fire, does not constitute a condition precedent, the failure to perform which would preclude a recovery under the policy, where there is no provision in the policy declaring that such failure renders the policy void.
4. Where such a policy provides that the loss shall not become payable until sixty days after proofs of loss have been filed, a failure to file proofs of loss within the sixty day period referred to in the preceding paragraph merely postpones the time of payment of the loss.
5. Where, in an action for recovery under a policy of fire insurance, the defendant company sets up separate defenses in each of which there is a general denial and a specific denial, the general denials will be considered as limited and restricted to such particulars

as are pointed out in the specific denials and the only issues tendered will be those raised by the specific denials.

Edward Colston and Wallace Burch, for plaintiff.
J. W. Mooney and Robert L. Black, contra.

SUTPHIN, J.

This is an action to recover on a policy of fire insurance. The case came on for trial upon the issues joined by petition, answer and reply, and at the conclusion of the plaintiff's evidence the defendant made a motion to arrest the case from the jury and direct a verdict for defendant, which was overruled. Defendant thereupon rested without introducing any evidence. The facts in this case were undisputed and the court directed the jury to return a verdict for the plaintiff in the sum prayed for, with the exception that the interest was to be calculated from March 15, 1913, instead of from March 10, 1913, as set forth in the prayer of petition, which modification was requested by counsel for plaintiff.

The facts in this case were as follows:

On October 31st, 1912, the Connecticut Fire Insurance Company issued a policy of insurance for one thousand (\$1,000) dollars to Isabella F. Wood on a building located at No. 234 East Front street, Cincinnati, Ohio, insuring said premises for a period of one year from that date, and the premium due thereon was paid. On November 12th, 1912, at one o'clock in the morning, the building was completely destroyed by fire so as to render it a total loss. On November 25th, 1912, Isabella F. Wood died, and on December 3, 1912, the plaintiff, Albert S. Wood, her son, qualified as executor under her last will and testament. For some twenty years prior to her death the insurance on this property had been looked after and arranged for by the insurance firm of C. F. Runck & Company, who not only secured the policy in question but had their name stamped on the back of the policy. The policy itself had been secured from the insurance firm of Earls & Johansing, who signed the same as agents for the defendant company. The proofs of loss under this policy, as well as under other policies covering the property, were prepared by the plaintiff with the assistance of

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his counsel, Mr. Wallace Burch, and on January 8th, 1913, were delivered to C. F. Runck & Company. The proofs were returned to Mr. Burch to correct some technical oversight, and supplemental proofs were prepared and delivered to C. F. Runck & Company on January 10th, 1913. At eleven o'clock on that day Mr. C. F. Runck himself took these proofs of loss and delivered them to Earls & Johansing, the agents whose name appeared on the policy itself, but the latter refused to accept them, stating that the matter was in the hands of the state agent, Mr. Reynolds. Mr. Runck thereupon took the proofs of loss over to Mr. Burch's office, and in his absence left them with his stenographer, Miss Howe, at the same time advising her that Earls & Johansing had refused to accept the proofs and that therefore Mr. Burch had better send them at once to the home office of the company. Mr. Burch received this message upon his return to the office and immediately wrote a letter to the defendant company, addressed to its home office in Hartford, Connecticut, and enclosed therein the proofs of loss. This letter was mailed at the registry department of the post office at Cincinnati, between five and six o'clock on that same day, and a receipt obtained therefor. It is admitted that these proofs of loss were received by the defendant company at its home office on January 13th, 1913. The tenth day of January above mentioned, was the fifty-ninth day after the loss occurred and was on a Friday. The Monday following, to-wit, the 13th, was the sixty-second day after the loss had occurred.

The policy, as above stated, was issued October 31st, 1912, in the name of Isabella F. Wood as the insured. For a number of years prior thereto this property had been looked after entirely by Mrs. Wood's son, Albert S. Wood, the plaintiff in this case. He had rented the property, collected the rents, looked after the repairs, paid the taxes and insurance, and in fact had done everything that there was to be done with reference to the property itself, and had turned over the proceeds to his mother. It seems that Mrs. Wood owned in addition to this property, her old home in Hyde Park, Cincinnati, in which she and her family lived. Some time prior to September 29th, 1911, Mrs. Wood, who was then seventy-six years of age and in

a feeble condition of health, was being bothered by real estate agents, who were trying to get her to sell the old home in which she had lived for over forty years, and in fact one real estate agent had induced her to sign some paper. This experience greatly worried Mrs. Wood, as she felt that these real estate agents were taking advantage of her advanced years and feeble condition of health; whereupon she had a conference with all the members of her family and her lawyer, Mr. Burch, and it was decided that to protect her against further trouble, she should turn over all her property, including the property on Front street, which was the subject of this insurance, to her son, Albert S. Wood, as trustee. In accordance therewith, on September 29th, 1911, she executed a deed conveying the property in question to Albert S. Wood, trustee, which contained the following clause:

“This conveyance is made upon the following terms and conditions: The said Albert S. Wood, trustee, is to hold said property in trust for the grantor with full power and authority to convey, transfer and sell said premises and re-invest the proceeds as said trustee may deem advisable, in his name as trustee; to rent the same, collect the rents, keep the property in repair and pay all the taxes, and account to the grantor for the net proceeds.

“It being agreed that said trustee is to receive one (\$1) dollar as the total compensation for all his services under this deed of trust.

“It is further stipulated that this trust is only to continue during the life of grantor and that at her death said trust is to terminate and cease and said property to be distributed as provided by grantor in her will.”

This condition of the title continued until the grantor's death on November 25th, 1912, as above stated. No change occurred in the relation of the parties towards this property as a result of this deed. Albert S. Wood continued to look after the property as he had been accustomed to, and to turn over the net proceeds to his mother. He did not in any manner convey or encumber the property, but merely continued to rent the same, collect the rents, keep the property in repair and pay the taxes. As far as insurance was concerned, C. F. Runck continued to

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look after it and would select the fire insurance companies and secure the policies, and then notify Mr. Wood of what he had done, whereupon Mr. Wood would come in and get the policy and pay the bill for premiums. On or just before October 31st, 1912, Mr. Wood had a talk with Mr. Runck, at which time he told him about the change in the title of the property and the circumstances leading up to it, so that on October 31st, 1912, when Mr. Runck handed this policy to Mr. Wood he advised him to have his mother assign the policy to himself as trustee, whereupon Mr. Wood took the policy home with him and his mother signed the form marked "Assignment of Interest by Insured," and he filled in her name as owner and his name as assignee and the date, November 2nd, 1912. A few days later he returned the policy to Mr. Runck, who promised to secure the consent of the company to such assignment of interest. This happened several days before the fire. The fire occurred, as above stated, at one o'clock in the morning of November 12th, 1912. Mr. Runck reached his down-town office about eight o'clock in the morning of that day, and when he learned that the fire had occurred, he immediately took the policy over to the office of the firm of Earls & Johansing and secured their signature as agents for the company, consenting to the assignment above mentioned, and inserting the date thereon of November 12th, 1912, so that, as a matter of fact, the consent of the company to this assignment was not obtained until after the loss had occurred.

The petition in this case was filed April 19, 1913, and after reciting the death of Isabella F. Wood and the appointment of the plaintiff as executor, alleged the ownership of the property in question, the issuance of policy by the defendant company and the payment of premium thereon; that the testatrix had duly performed all the conditions of the policy on her part to be performed, and that the building was totally destroyed by fire at the time above mentioned. The petition further alleged that on November 12th, 1912, the defendant was duly notified of the loss, and that on the 10th day of January, 1913, more than sixty days prior to the suit, plaintiff gave defendant due proofs

of loss, that defendant denied liability, and that no part of the loss had been paid.

The answer of the defendant contains three defenses:

First, an admission of incorporation and delivery of the policy in question. This is followed by a denial that defendant insured the testatrix unconditionally. The third paragraph is as follows:

“The defendant denies each and every allegation contained in plaintiff’s petition not herein specifically admitted or denied.

This is in turn followed by an allegation that the policy provided that the company should not be liable for a greater proportion of the loss than the amount insured should bear to the entire insurance. This last claim need not be considered in this case, as counsel for defendant admitted during the trial that there had been a total loss.

The second defense in the answer incorporates as a part of it all of the admissions, denials and averments contained in the first defense, and after quoting certain provisions in the policy sets up a separate defense that plaintiff had failed to file the written statement and proofs of loss required by the policy within sixty days after the fire.

The third defense incorporates the same matters above referred to, and then sets up as a separate defense that the interest of the insured in the property was other than sole and unconditional ownership and that said interest was not truly stated in the policy. The answer concludes with an offer to return the premium which had been paid on the policy.

The reply to the first defense in the answer was that the loss was total and in excess of the amount of insurance, followed by a general denial. The reply to the second defense was a general denial coupled with the allegation that plaintiff had notified defendant of the loss and that defendant advised him that it refused to pay the policy. Insofar as this was an attempt to plead a waiver, it was improper to be set up in the reply, but as no evidence was offered on this point it becomes immaterial. The reply to the third defense was a general denial coupled

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with the allegation that plaintiff had duly notified defendant of the conditions of and title to said property.

Counsel for defendant claim that the court erred in overruling the motion to direct a verdict for the defendant and in directing a verdict for the plaintiff for the following reasons:

First, that plaintiff failed to prove that immediate notice of the loss had been given in writing to the company.

Second, that plaintiff failed to prove the delivery of proofs of loss to the company within sixty days after the fire.

Third, that the interest of the insured was other than unconditional and sole ownership.

I.

This first point was not raised during the trial of the case but was advanced for the first time upon argument of motion for a new trial. The solution of this question must primarily depend upon whether the matter of giving notice of the loss to the company was an issue raised by the pleadings. In support of this contention defendant relies upon the case of *Moody v. Insurance Co.*, 52 O. S., 12, in which it was held that the defense of "unauthorized vacancy," as the defense of sole unconditional ownership in this case, was a matter of affirmative defense the burden of proving which rested upon the defendant. The court distinguished such provisions of the policy as rendered it void, from other provisions the performance of which were conditions precedent to recovery, and in that connection, at the bottom of page 17, used the following language:

"And hence, the conditions precedent in such a policy include only those affirmative acts on the part of the assured, the performance of which is necessary in order to perfect his right of action on the policy, such as giving notice and making proof of the loss, furnishing the certificate of a magistrate when required by the terms of the policy, and, it may be, in some cases other steps of a like nature."

While this is really *obiter dictum*, its effect is to hold that in an action on a policy of fire insurance the plaintiff must prove due performance of all conditions on his part, if such conditions

are properly put in issue by defendant. It is claimed, therefore, that the answer of defendant raised the issue of notice of the loss in this case. The plaintiff pleaded due performance of all conditions on his part to be performed, and also that due notice of the loss had been given, and delivery of proofs of loss had been made. To this petition defendant filed an answer setting up three defenses in each of which was incorporated the language, "the defendant denies each and every allegation contained in plaintiff's petition not herein specifically admitted or denied."

It is a serious question, in the first place, whether such language constitutes a general denial, but assuming that it does, we find coupled with it under the second defense a specific denial that statement in writing and proofs of loss were made and rendered to the company, as required by the terms of the policy, which was in turn denied by the reply; in other words, we have an answer containing a general denial coupled with a specific denial, and the question is therefore raised whether the general denial is not thereby limited and restricted to such particulars as are pointed out in the specific denial.

In referring to the rule above announced, the Supreme Court in the *Moody* case said on page 20:

"Especially should the rule be as we have stated it, under our code system of pleading, a prominent object of which was to so simplify the issues, that the evidence might be confined to the real matter of dispute, thus expediting the trial of causes and facilitating the business of the courts."

The effect of a specific denial is shown by the language of the Supreme Court in the case of *Ridenour v. Mayo*, 29 O. S., 138, at 145, where the court says:

"It is true, the fact thus pleaded might have been given in evidence under a denial of the facts stated in the petition, and, as a general rule, matters which may be given in evidence under the general issue should not be *specifically pleaded*. To this rule, however, there are some exceptions.

"By pleading the facts stated in this answer an issue was tendered, which is much narrower than the general issue or an issue made by a general denial; and the issue thus tendered, no

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doubt, involved all the facts which were in dispute between the parties. The prime object in pleading is to narrow the controversy between the parties by joining issue only upon such material facts as are really in dispute."

The conclusion to be drawn from this language is that the defendant in the case at bar, by pleading the specific denial, narrowed the issue to the only condition precedent in dispute, to-wit, the rendering of a statement in writing and proofs of loss within sixty days. Here there were a number of conditions precedent which it might have been necessary for plaintiff to prove if properly raised in issue, but the defendant saw fit to narrow the issue by specifically setting out the particular condition and its breach, thereby advising the plaintiff and the court of the issue to be tried. Can the defendant now be heard to say that its general denial imposed upon plaintiff the burden of proving the other conditions precedent, not specifically denied, or rather, was not the plaintiff entitled to presume that the only condition precedent in dispute was that specifically denied? Section 11314 of the code provides that an answer shall contain "a general or specific denial of each material allegation of the petition controverted by the defendant." The word "or" is significant and indicates that a denial must be either general or specific, but can not be both. When it is both, courts have construed that the general denial raises no issue outside of the specific denial. See *Brewing Co. v. American Ice Machine Co.*, 77 Fed. Rep., 138 (decision of the Circuit Court of Appeals, 8th Circuit); *Kahnweiler v. Phenix Ins. Co.*, 67 Fed. Rep., 483; *Bliss Code Pleading*, 3d Ed., Section 356a; *Preston v. Roberts*, 12 Bush, 570. Applying this rule to the question involved, there was no issue raised by the pleadings as to giving notice, and therefore it was not incumbent upon the plaintiff to prove it as a condition precedent to recovery.

II.

The policy in question is what is known as a "New York Standard Form Policy," and the provisions pertaining to the second question under consideration are as follows:

"If fire occur the insured * * * within sixty days after the fire unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and of all others in the property; the cash value of each item thereof and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property; and a copy of all the descriptions and schedules in all policies; any changes in the title, use, occupation, location, possession or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described and the several parts thereof were occupied at the time of fire; and shall furnish, if required, verified plans and specifications of any building, fixtures, or machinery destroyed or damaged."

This is followed by provision for appraisement if parties can not agree on the amount of loss, and the clause as to when the loss becomes payable is as follows:

"And the loss shall not become payable until sixty days after the notice, ascertainment, estimate, and satisfactory proof of the loss herein required have been received by this company, including an award by appraisers when appraisal has been required."

And then a provision as to suits on the policy in the following language:

"No suit or action on this policy for recovery of any claim shall be sustainable in any court of law or equity until after full compliance by the insured with *all the foregoing requirements*, nor unless commenced within twelve months next after the fire."

The undisputed facts show that a delivery of these proofs of loss were made to Earls & Johansing on the fifty-ninth day after the fire, and the question therefore is whether this delivery to the agent of the defendant company was sufficient to satisfy the terms of the policy within the meaning of the law. No question is raised as to the sufficiency of the statement or proofs of loss themselves. The evidence tended to show that the defendant

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company furnished Earls & Johansing printed forms of insurance policies signed in blank by the president and secretary of the company, with power to counter-sign and issue the policies on behalf of the company without any further consent from the officers of the company. They were also authorized to collect premiums and to execute consents to assignments of interest by the insured, and to grant permission to remove property insured. Furthermore, the policy by its express terms, contemplates that certain of its conditions can be waived or modified by such agents as Earls & Johansing, provided it is in writing and attached to the policy. In fact, it would seem that the sixty day period for filing proofs of loss could be extended by such consent in writing. It has been distinctly held in this state that an agent for an insurance company, possessing such authority, is to be considered a general agent of the company within the meaning of the law. *Machine Co. v. Insurance Co.*, 50 O. S., 549.

The terms of this policy are that such proofs of loss shall be *rendered* to the company. The policy does not provide that it shall be made to the home office of the company or to any particular officer of the company—but merely to the company. Now, the defendant company, like any other corporation, can only act by its officers and agents. Here we have a company with its home office in Hartford, Connecticut, doing business presumably all over the United States—a business which by its very nature requires the employment of agents at various points within such territory. It is only by the employment of such agents that the company is enabled to transact a larger business than it could handle solely through its home office. The firm of Earls & Johansing was the duly commissioned agent in Cincinnati, to whom had been granted the power to set in motion the entire machinery of insurance by the signing of blank policies. In view of these circumstances it is difficult to follow the argument of counsel for defendant when they say that the authority of such agents for the defendant company shall be deemed limited to that period of time up until a loss occurs and from that point on they are entirely without authority to represent the company; in other words, while there are contracts to be issued and premiums to be collected, Earls & Johansing are to be con-

sidered the agents of the company, but the moment a loss occurs and the company is called upon to perform its part of the contract, then such agency is automatically revoked, and the insured, who has been led to look upon such agents as an integral part of the company itself, finds that he has been doing business with a mere shadow. Such a contention appeals to the court as narrow and arbitrary and overlooks the apparent scope of these agents' authority as a matter of law. There is certainly nothing in the policy to indicate that the authority of such agents was so limited, nor is there anything to show that either the insured or the plaintiff in this case had any notice to such effect.

Our conclusion therefore is that in the absence of an express provision in the policy, or notice otherwise given to the insured to the contrary, an agent who is authorized to solicit insurance, to issue and counter-sign policies, and to collect premiums, is a general agent representing the company for the purpose of receiving or being served with proofs of loss in case of fire, and that the delivery of proofs of loss to such an agent is a delivery to the company where the policy requires proofs to be rendered to the company. This view is supported by the following authorities:

Insurance Co. v. Krutchfield, 108 Ind., 518, where at page 526 the court said:

"We know of no good reason why it should not be held, also, where a condition of the policy, as in the one under consideration, requires that the assured shall render the particular account of his loss to the company, and not to any specified officer or person, or at any specified office or place, that the rendering of such particular account of his loss by the assured, to the duly authorized agent of a foreign insurance company, will constitute a sufficient compliance by the assured with the terms of such condition." * * * 4 *Joyce on Insurance*, Section 3312; 4 *Cooley Briefs on Insurance*, 3379; *Green v. Insurance Co.*, 190 Mass., 596; *DeMichele v. Insurance Co.*, 120 Pac. Reporter (Utah), 846; *Vesey v. Insurance Co.*, 101 N. W. Rep. (Dakota), 1074; *Greenlee v. Insurance Co.*, 73 N. W. Rep. (Iowa), 1050.

This exact proposition does not seem to have been passed upon in this state. The decisions relied on by counsel for defendant are readily distinguishable. For instance, in the case of *Union*

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Central Life Insurance Company v. Hook, 62 O. S., 256, an agent who solicited a policy of insurance attempted to make certain verbal modifications of same and also attempted to vary the terms of the policy with reference to the payment of premiums, when by the express terms of the policy the payment of premiums could not be waived without the consent of certain definitely described officers of the company. There can be no question that such is the law, but it had no application to the case at bar. A case particularly relied upon was that of *Stacy v. Insurance Co.*, 25 C. C., 67, which was reversed without report in 72 O. S., 593. In that case it was claimed that the agent waived the filing of proofs of loss within sixty days by denying liability under the policy. By the terms of the policy a waiver of such condition could not be made the subject of agreement even in writing, and we can well understand that a power to waive a condition of a policy would be far more strictly construed than a power to accept the delivery of proofs of loss within the time specified in the policy itself. In other words, in the case at bar the agent was neither attempting to violate any express term of the policy nor to waive any of its conditions. In the case of *Johnson v. Insurance Co.*, 66 O. S., 6, it was held that an agent to procure a policy of insurance would not, after having delivered it to the insured, be presumed to have authority to receive notice of cancellation which would discharge the policy itself. Such presumed authority would be entirely foreign to the general authority, expressed or implied, to procure insurance in the first instance and would have no bearing upon the case under consideration. A very good example of this is found in the case of *Insurance Co. v. Myers*, 62 O. S., 529, where it was claimed that the soliciting agent of an employer's liability insurance company waived the express provision in the policy requiring the insured to give notice of the accident. As the Supreme Court said in that case:

"He was a mere soliciting agent, and was invested with none of the powers of a general agent, or of a special adjusting agent.
* * * So far as we are informed his duties ended when he received and transmitted to the company the application of the insured for the insurance."

Besides there was an express provision in that case that no agent had authority to waive or alter in the policy contained, which was notice to the insured that any attempted waiver by the agent was in direct violation of the express terms of the policy.

There is another ground, however, upon which this branch of the case can be disposed of without considering the delivery of proofs of loss to the agent of the company. It was tentatively admitted that proofs of loss were received at the home office of the company on the sixty-second day after the fire. At any rate the undisputed fact is that the proofs were mailed in a letter addressed to the defendant's home office on the fifty-ninth day after the fire, and in the absence of any testimony to the contrary the court would presume that this letter reached its destination in due course of mail and was received by the party to whom it was addressed. This raises the question as to whether the clause in the policy requiring the proofs of loss to be filed within sixty days is a condition precedent to the filing of suit on the policy, or whether such requirement merely postponed the time of payment of the loss. It is to be particularly noted that the clause in the policy requiring the delivery of these proofs of loss within sixty days, is in a paragraph by itself and included within lines sixty-seven to eighty. Nothing in this paragraph indicates or even suggests that the failure to file proofs within such time shall render the policy void; in other words, it is not a condition of forfeiture. The second and third paragraphs of this policy are a series of provisions, violation of which render the entire policy void. In the third to last paragraph, lines 106 and 107, it is provided that no suit or action can be brought on the policy "until after full compliance by the insured with all the foregoing requirements." From this it is argued that the filing of proofs of loss within sixty days is one of those requirements which became a condition precedent to recovery—in other words, a condition precedent to liability. This involves the construction of the contract, and as in all such cases, the court has to be governed primarily by what it considers was the intention of the parties. If this last clause of the

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contract renders the filing of proofs within sixty days a condition precedent to liability, it is equivalent to declaring that a violation of such requirement would render the entire policy void, because what difference can there be in practical effect between rendering the policy void and absolutely barring recovery under it, when the company refuses to pay? It is a well established principle of law that courts do not favor forfeitures and that while they will enforce forfeitures expressly provided for, they will not read a forfeiture clause into a policy of insurance by implication. As the Supreme Court said recently:

“The law abhors a forfeiture, and will countenance it only *strictissime juris*.” *Ensel v. Insurance Co.*, 88 O. S., 269.

The answer to the contention of defendant is that if it was the intention of the parties that the compliance with this requirement should be a condition precedent to liability, why was it not inserted in the policy in plain, unambiguous language? Such an interpretation, in the judgment of the court, would be clearly against the letter and spirit of the contract, and certainly unjust as applied to the facts in this case. The more logical inference from these provisions would be that no suit could be brought upon this policy until the proofs of loss had been filed and sixty days had elapsed thereafter. The court can well understand that if there had been such a delay in filing proofs of loss as to cause damage to the insurance company, that the insurance company would in justice be entitled to recover from the insured for such loss or damage, and it would seem a proper matter of set-off to an action on the policy. But in the present case no hardship, loss or damage could have been suffered by the defendant company, because the proofs of loss were received by it on Monday, the sixty-second day, instead of Saturday, the sixtieth day. It is contrary to the modern tendency of the courts to permit a bare technicality to defeat recovery on a policy of fire insurance. This conclusion finds support in a recent announcement by the court of appeals in the case of *Central Trust Company v. Insurance Company*, 17 C.C.(N.S.), 411, the first syllabus of which reads as follows:

"The provision in a policy of fire insurance that proofs of loss must be presented to the company within sixty days after the occurrence of a loss by fire in the premises insured, does not render the policy void by reason of failure to file proofs within the prescribed time, where there is no provision in the policy which renders it void by reason of such failure."

From an examination of the record in that case it appears that the fifth defense set up in the answer of the insurance company was the same as the second defense of the answer in the case at bar, and that the terms of the policy were identical with that of the policy in question. From an examination of briefs of counsel in that case it appears that this question was squarely presented in argument, and therefore this court regards the conclusion of the court of appeals on this point as a definite pronouncement of law on the subject. It certainly is in accord with the weight of authority in this country. See 4 *Cooley's Briefs on Insurance*, 3369, where that author says:

"The weight of authority, however, as already stated, seems to support the rule that neither a provision that the loss shall not be payable until after the stipulated proofs have been furnished, nor the provisions that no action shall be maintainable until after such compliance with the policy, will render the furnishing of proofs within the stipulated time a condition precedent. Rather do such provisions by their phraseology, indicate an intention that the payment or loss shall be merely postponed until the proofs are furnished."

Joyce on Insurance, Volume 4. Section 3282:

"If a policy of insurance provides that notice and proofs of loss are to be furnished within a certain time after loss has occurred, but does not impose a forfeiture for failure to furnish them within the time prescribed, and does impose a forfeiture for failure to comply with other provisions of the contract, the insured may thus hold and maintain an action although he does not furnish proofs within the time designated, provided he does furnish them at some time prior to commencing action on the policy."

See also 13 *American and English Encyclopedia of Law*, 2d Ed., 329. 19 Cyc., 849, note 49.

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A great mass of cases support this view, including decisions of the highest courts in some sixteen or seventeen states. The doctrine further finds support in the reasoning expressed in *Insurance Co. v. Gray*, 2 C.C.(N.S.), 265 (affirmed without report by the Supreme Court, 69 O. S., 542). Counsel for the defendant contend, however, that this doctrine is contrary to the law of Ohio as announced in *Insurance Co. v. Lindsey*, 26 O. S., 348, decided in 1875. But that case did not involve the terms of a New York Standard Form of Policy, as evidenced by the clauses which were set forth in the report, although the full policy was not shown. Furthermore, it was merely a decision on a demurrer, and the court treated the policy as containing an express condition precedent, which if not performed or waived would prevent an action on the policy, and for aught there is to show this may have been true. Considerable reliance is placed in the case of *Layne v. Insurance Co.*, affirmed by the Supreme Court without report, 78 O. S., 397. It is true that the proofs of loss in that case were not delivered until some ten days after the expiration of the sixty day period, but it is also a fact that suit was brought before the policy became payable, to-wit, before the expiration of sixty days after proofs of loss were filed, which of itself would be fatal. From an examination of the record of that case it appears there was a directed verdict for the defendant by the trial court without indicating on what grounds the court acted, and there is nothing in the record to show upon what point or points the Circuit or Supreme Court affirmed the judgment below. This court therefore would not be justified in concluding that the Supreme Court in that case passed upon the question at bar. Counsel also relied upon the case of *Billings v. Insurance Co.*, 6 C.C.(N.S.), 567, in which it was held that the policy was rendered void by a failure to present proofs within the time limit, but there can be no question about that decision because there was an express clause in the policy which read:

“This entire policy, unless otherwise provided by agreement endorsed thereon or added thereto, shall be void if the insured now has * * * or in case of loss, if sworn statement, in accordance with all the requirements of this policy, as hereinafter

provided, shall not be rendered within sixty days after the fire."

This case illustrates the fact that a decision of another court can only be considered in connection with the terms of the policy involved. The Standard Form of Policy in the case at bar does not contain any such clause as was found in the Billings case. If the failure to file proofs of loss within sixty days is to render a policy void, it should be expressed in the policy itself so that the insured may have positive notice of the necessity of filing proofs of loss within that time.

III.

The third and last question is whether the interest of the insured was other than sole and unconditional ownership within the meaning and the terms of the policy. The policy provided as follows:

"This entire policy, unless otherwise provided by agreement endorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership."

It is admitted that prior to September 29th, 1911, Mrs. Wood was the owner of the fee simple title to these premises, and it is further admitted that even at the time this policy was issued Mrs. Wood had at least an insurable interest.

It is generally recognized that the purpose of such a clause is to prevent a person who has only an undivided or contingent interest from appropriating to his own use the proceeds of a policy as if he were the sole owner, and to remove from him the temptation to perpetrate a fraud and crime. In other words, its purpose is to protect the company against the payment of losses to individuals who have not, in fact, sustained them and thus prevent fraud upon the company itself. The language of the clause above quoted must be construed in the light of the reason and object of its use by the parties, for to do otherwise would be to adhere to the technical letter of the law in disregard of its spirit. It is not a question of the title possessed by the insured, but a

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question of the interest of the insured in the property. Here was a woman of advanced years and feeble condition of health, annoyed and harassed by real estate agents who sought to induce her to dispose of her old home in which she had lived for forty years. It was for the express purpose of relieving her of this trouble and worry that she executed this deed after a conference with her family. In other words, the object sought to be accomplished was purely a matter of personal convenience, in no wise signifying a desire or intention on her part to really dispose of her interest in this property which she owned. The conveyance to her son as trustee was merely a transfer of the legal title to the property; the grantor reserved to herself the equitable title by the express terms of the instrument. It was a trust created for the benefit of herself, and while there was power of sale given, if it was exercised, the proceeds were to be for the benefit of herself, and upon her death this property or its equivalent was to pass as she might see fit to provide by will. She possessed all of the incidents of ownership, divesting herself merely of the bare legal title. If the property had not been insured and had been destroyed by fire, the loss would have fallen upon Mrs. Wood and no one else. She alone had the actual and substantial interest in the property. The relation of herself and her son towards this property, according to the testimony, was exactly the same after the deed was executed as it had been before. He had attended to all matters pertaining to the property and merely continued to do so. Under these circumstances we are of the opinion that this deed, in its last analysis, was nothing more than a power of attorney to permit the son to look after the property as he had been doing, and the trust was created solely for the purpose of building up around this woman a protection from the annoyance of real estate agents, and that at no time was her interest in this property other than sole and unconditional ownership within the meaning of the law. The authorities in support of this view are as follows: 2 *Cooley's Brief on Insurance*, 1369, and 1376 (g); 5 *Elliott on Contracts*, Sec. 4252; *Insurance Co. v. Erb*, 112 Pa., 149; *Insurance Co. v. Dunham*, 117 Pa., 460, in which latter case the court said:

"The purpose of this provision is, to prevent a party who holds an undivided or contingent but insurable interest in property, from appropriating to his own use the proceeds of a policy, taken upon the valuation of the entire and unconditional title, as if he were the sole owner, and to remove from him the temptation to perpetrate fraud or crime. For without this, a person might thus be able to exceed the measure of an actual indemnity. But where the entire loss, if the property is destroyed by fire, must fall upon the party insured, the reason and purpose of this provision does not seem to exist; and in the absence of any particular inquiry as to the specific nature of the title, or of any express stipulation in the policy that the insured held the legal or equitable title, either being available to secure an entire, unconditional and sole ownership, the provision referred to can, we think, have no force to defeat the plaintiff's recovery in this case."

In *Yost v. Insurance Co.*, 179 Pa., 384, the court uses this language:

"The conditions of the policy are to be understood, not in their technical sense, but as requiring that the insured be the actual and substantial owner. *Beech on Insurance*, Section 405."

Insurance Co. v. Boudre, 67 Miss., 626, at 634; *Johannes v. Insurance Co.*, 70 Wis., 196, at 200, the court said:

"The equitable title, if sole and unconditional, answers the description, and if the property was destroyed, the entire loss would fall upon the plaintiff."

In *Hough v. Insurance Co.*, 29 Conn., 10, the court says on page 20:

"So, too, he is the owner of such absolute interest, who must necessarily sustain the loss, if the property is destroyed. The subject of insurance was an interest, not a title. * * *

"It seems to have been the leading object of the framers of this third article of the conditions of insurance, to protect the company against the payment of losses to individuals who had not in fact sustained them."

Hawley v. Insurance Co., 102 Cal., 654:

In this latter case there had been a deed conveying absolute title to the land, but the court permitted parol evidence to show

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that it was, in fact, a mortgage and that such was the intention of the parties. As in this case, the woman had owned the property for more than twenty years and the deed had been executed a year before the policy was issued. This doctrine has been recognized by the common pleas court of this county in the recent decision of *Little v. Insurance Co.*, 9 O.N.P.(N.S.), 377, in which a number of the cases above cited were reviewed.

This disposes of the important questions in the case. It is not necessary to consider the effect of the attempted assignment of this policy, because, in the first place, the fact is clearly established that the consent of the company's agents to the assignment was not obtained until after the loss had occurred, and therefore the assignment was incomplete and invalid, and in the second place, if the assignment had been completed the interest of the insured, according to the testimony, would have remained the same.

Considerable time was devoted in argument to the subject of Mr. Runck's capacity, as agent, to represent or bind the company by virtue of Section 9586 of the General Code, but in view of the conclusions of the court hereinabove announced it would not seem necessary to consider that question.

The motion for a new trial will be overruled.

ACTION FOR LOSS OF GOODS STORED FOR HIRE.

Common Pleas Court of Franklin County.

CORA M. HECKLER v. THE COLUMBUS TRANSFER COMPANY.

Decided, November 5, 1914.

Pleading—Where the Claim of a Bailor Rests Upon Contract—And the Defense is Based on Loss by Fire—Not Admissible to Allege Custom and Usage with Reference to Care Exercised by the Bailee—Burden of Proof Distinguished from Weight of Evidence.

Where a bailor sues the bailee in contract on the bailment for loss of goods bailed, instead of in case for negligence, proof of failure of the bailee to deliver on demand, establishes a *prima facie* case of negligence, and places the burden on him to prove that he was ordinarily prudent.

J. A. Allen, for plaintiff.

Gumble & Gumble, contra.

KINKEAD, J.

This is an action for damages for the value of goods stored by plaintiff with defendant which were not returned on demand. The petition declares upon the contract of bailment and for the breach thereof for failure to deliver the same to plaintiff upon demand. In other words, the plaintiff has elected to sue in *assumpsit* instead of case. This is another striking illustration of the truth that the right of election is as important and essential under the code as formerly in order to properly adjust the rights of parties. The distinction is essential to decide the rights of parties.

Plaintiff alleges the delivery of the goods and the presentation of the receipt to the defendant, that the demand in writing was made for the delivery to plaintiff of all the goods stored in the warehouse of defendant, its refusal to deliver, and the value thereof.

Defendant admits the storage and demand for delivery. It alleges that it is engaged in the storage and warehouse business,

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that the goods of plaintiff were totally destroyed by fire, the origin of which was unknown, but which was not occasioned by any act of negligence of defendant.

Defendant avers that it has been engaged in that business for more than twenty-five years at its place of business, that defendant had some goods of its own stored there which were likewise destroyed by said fire, and that there was stored with defendant at its aforesaid warehouse at the time of said fire, goods and chattels belonging to many and various other persons, similar to those claimed to have been stored by plaintiff, which were likewise destroyed by fire. That all of the goods and chattels so destroyed by fire of unknown origin was stored in the same place and in the same manner and attention as defendant had for nearly twenty-five years used, given and bestowed upon similar goods and chattels left with it for storage.

A motion is made by plaintiff to strike out all of the above affirmative matter set up by defendant, which presents important questions of procedure.

The cause of action is in *assumpsit*. A case is made by proof of ownership, delivery for hire to defendant, and failure on its part to deliver to the bailor on demand and the value of the property. The burden is thereupon placed upon the defendant bailee to affirmatively prove by a preponderance of the evidence that he was not guilty of negligence contributing to the cause of the loss by fire, being obligated to show that he has been ordinarily prudent.

In this case, for example, the question whether defendant was negligent is presented by allegations in the answer that defendant had some of its own goods stored in the same place and manner which were also destroyed by fire.

The burden is on defendant to overcome the *prima facie* proof of negligence, which is established by proof of failure to re-deliver the goods to the bailor upon his demand. See *Wintringham v. Hayes*, 144 N. Y., 1; *Higman v. Camody*, 112 Ala., 257 (57 Am. St., 33); Schouler B'Imts., Section 134.

The obligation of proof is different where the bailor founds his cause upon negligence than it is when it is in *assumpsit*, in which case the burden of proving loss by negligence of the bailee rests

upon the plaintiff in the first instance to show that the negligence of defendant caused the loss to plaintiff as part of his case. *Maloney v. Taft*, 60 Vt., 571 (6 Am. St., 135); *Lancaster Mills v. Cotton Press Co.*, 24 Am. St., 586.

But where the demand by the bailor rests upon the contract of bailment, as it does in the case at bar, proof of failure on the part of the bailee places the burden on him to prove that he was ordinarily prudent. See, also, *Woodruff v. Painter*, 150 Pa. St., 91 (30 Am. St., 786); *Mills v. Gilbreth*, 47 Mt., 320.

The answer of defendant in this case to which objection is made undertakes to comply with this rule by pleading facts which negative the *prima facie* case of negligence established by the proof of failure to re-deliver the goods upon demand. It is said that the bailee is presumed to have been negligent, and that the burden is on him to show the exercise of such care as was required by the bailment. *Cumins v. Wood*, 44 Ill., 416; *Funkhouser v. Wagner*, 62 Ill., 60; *Hawkins v. Haynes*, 71 Ga., 40.

In this case defendant claims to have exercised the same care of his own property as it did for that of plaintiff and others. And it is said:

“That the bailee has dealt with his property, and the bailor’s in the same way, is a fact which may be always shown as an element in adjusting the standard of duty, and deciding the question of the performance, as well as a test of the bailee’s good faith. On the proof of such a fact, a presumption of adequate diligence would ordinarily arise. * * * The desire to preserve one’s own property from loss from any cause is, as a rule so universal, that the mind rests with satisfaction on the evidence which shows the same care of the bailed property which the bailee took to save his own.

A charge to this effect was held unobjectionable in *Bank v. Graham*, 79 Am. St., 106.

Of course it must be made to appear that the care used by the bailee was that ordinarily exercised in similar classes of bailments. This feature is not expressly stated in the answer although it may be inferred from the presumption which arises from the facts alleged. It would be better to expressly allege that ordinary care has been exercised.

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Custom may be shown if alleged. 5 Cyc., 218; 47 Am. Rep., 284; 51 N. C., 368. It may be shown to qualify the liability of the bailee. *Kelton v. Taylor*, 11 Lea., 264 (47 Am. Rep., 284). But customary conduct of an individual is not custom in legal contemplation.

The question of burden of proof is to be considered in arriving at a conclusion upon the question. It has recently been held by the court of last resort that where an answer by new matter attacks the consideration of a note sued upon, though the defendant first offers affirmative proof, the burden of proving the consideration rests throughout the whole case upon the plaintiff. *Ginn v. Dolan*, 81 O. S., 121.

This decision changes the law in respect to the burden of proof, and as so many decisions concededly have done, we think the court confuses the "burden of proof" with the "weight of the evidence." It had always been the rule that the burden of proof, that is the obligation of going forward with the evidence, was upon a defendant who alleges new matter constituting an affirmative defense. This right to have the burden of proof properly enforced is a valuable procedural right, infringement of which is prejudicial. When a defendant offers his proof, and the plaintiff offers countervailing proof, the weight of the evidence may shift from one side or the other. But if a defendant does not have a preponderance of the evidence to support his defense, or if it is evenly balanced he must fail in his defense. Carried to its logical conclusion in this case, if defendant does not show that it exercised ordinary care by a preponderance of evidence, then plaintiff is entitled to recover upon mere proof of ownership of goods, delivery in bailment to defendant and failure to re-deliver upon demand.

It might be urged that the rule of *Ginn v. Dolan*, *supra*, demands a different interpretation. In an action on a promissory note plaintiff may rest upon the presumption of consideration, or may offer some evidence to prove it. Want of consideration has always been considered new matter, the burden of proving which is on defendant, but the rule of burden is now changed.

In arriving at the conclusion in this case, the cases of *Ginn v.*

Dolan, 81 O. S., 121, *Klunk v. Railway*, 74 O. S., 125, are distinguished. They are to be regarded as the law in the cases which they cover, although the doctrine may seem to be an innovation in practice due to confusion of terms of procedural rights.

The claim of ordinary prudence is made in the answer. Proof of ownership, bailment, demand and failure to re-deliver makes out plaintiff's case. The burden is on plaintiff to make proof only of these facts. After this the burden is on the defendant of going forward with his evidence to prove his claim. He may prove how he stored his own goods and rest there on the presumption of due diligence thereby arising, or he may proceed further to establish by the weight of the evidence that he exercised reasonable care. The weight of the evidence may then shift as between plaintiff and defendant on the question of due diligence raised by the affirmative defense as to which the burden is on defendant.

All these considerations tend to show the propriety of not striking the matter out of the answer. So much of the answer as relates to the storage of goods of various other persons in a similar manner, and to the effect that the same manner of care and attention had been given the storage of such goods as had been given and bestowed upon similar goods and chattels left with defendant for nearly twenty-five years, is in the judgment of the court improper and should be stricken out. Custom and usage in the same line may sometimes be pleaded and proven. But the custom and usage of the defendant may not be shown because the sole question is whether it has exercised ordinary and reasonable care under the circumstances.

The motion is, therefore, overruled in part and sustained in part, as indicated by the opinion.

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State ex rel v. Faulkner.

DISTRIBUTION OF COLLATERAL INHERITANCE TAX.

Common Pleas Court of Greene County.

STATE OF OHIO, EX REL TRUSTEES OF NEW JASPER TOWNSHIP,
v. AMOS E. FAULKNER, AS AUDITOR ET AL.

Decided, April, 1915.

Taxation—Construction of Section 5331, Giving Fifty Per Cent. of Collateral Inheritance Tax to the Locality Where the Tax Originated.

Collateral inheritance tax assessed against realty originates in the city, village, or township wherein such realty is located, and the city, village, or township wherein the same is located is entitled to receive one-half of said tax regardless of where the residence of the decedent was at the time of his death, or that of his representative.

Marcus Shoup and H. D. Smith, for plaintiff.

F. L. Johnson, contra.

KYLE, J.

Rufus H. Ballard died intestate on the 14th day of September, 1914, in the village of Jamestown, Greene county, Ohio, where he had been a resident for some time before his death. An administrator was duly appointed, and by reason of his estate passing to collateral heirs it was subject to the inheritance tax law.

At the time of his death he was the owner of 160 acres and the undivided one-third interest in 219 acres of land situate in New Jasper township, Greene county, Ohio. The administrator of his estate paid the inheritance tax on the lands situated in New Jasper township, in the sum of \$1,063, into the county treasury. The trustees of New Jasper township bring this action in mandamus against the defendants, the county auditor and county treasurer of Greene county, for an order commanding them to pay 50 per cent. of such collateral inheritance tax, amounting to \$531.50, to the relators as representatives of said New Jasper township.

Under the former inheritance law 25 per cent. of the collateral inheritance tax was ordered paid to the use of the county where-

in it was collected. Since the adoption of the amendment to the Constitution relative to the distribution of the income and collateral inheritance tax the Legislature passed Section 5331, which provided that "50 per cent. of such tax shall go to city, village or township in which said tax originates."

Rufus H. Ballard having died in the village of Jamestown and the land upon which the tax was collected was situate in New Jasper township, the question presented calls for a construction of that section which directs that "50 per cent. of the tax shall go to the city, village or township in which said tax originates." If the tax could be said to originate at the place of the residence of the deceased then the share that did not go to the state would go to the city, village or township where the decedent was a resident at the time of his death.

In this case the collateral inheritance tax was the amount assessed against the realty, and if the tax could be said to originate where the property made the subject of taxation is located then the location of the property subject to taxation would fix the city, village, or township which was to receive the one-half of the collateral inheritance tax, regardless of where the residence of the decedent was at the time of his death.

The language of the statute, Section 5331, provides that "all property within the jurisdiction of this state, and any interest therein, whether belonging to the inhabitants of this state or not * * * shall be liable to a tax of five per cent. of its value above the sum of five hundred dollars."

If the residence of the owner determined the city, village or township which was to receive the portion of the inheritance tax, then there could be no inheritance tax where the owner was a non-resident of the state. In the case of a non-resident the place where the land was located would be where the tax originated, as it could not be supposed for a moment that that tax would be assessed to be forwarded to the former residence of a decedent beyond the state, and if such tax could be paid into the locality where the real estate was situated as the place where the tax originated there would be no reason for applying any other rule

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of construction when the decedent resided in a different city, village or township other than where the realty is situated.

Collateral inheritance tax is not a tax on the right of inheritance, but is a direct tax upon the property wherever found. The liability for the tax arises after the death of the decedent. The property vests immediately upon the death of the decedent, and the charge for collateral inheritance tax is an incident to such property in the hands of such distributee.

In this case the property vested in the collateral heir. As there was sufficient personal property to pay the debts, the administrator had no charge of or control over such realty and the right to tax arose upon the vesting of the title in the collateral heir.

When the proper conditions arise the tax at once attaches upon the property as a lien.

I think it was intended by the Constitution that so far as realty is concerned—which is the subject of the consideration in this case—that the tax should be paid into the city, village or township where the realty was situated. In that respect it would simply follow the rule as to all taxation of lands which have to be paid for the benefit of the city, village or township where situated regardless of the place of residence of the owner.

It might be claimed that because the administrator must pay the tax, therefore, the fund originates at the place of residence of the executor, or representative of the estate. The tax originated with the land, and not with the administrator or representative of the estate. The funds in his hands come from the decedent; they do not originate with him. Therefore, his place of residence could not fix the village, city or township that would be entitled to the tax.

Therefore, it being my opinion that in case of realty the collateral inheritance tax originated in the city, village or township in which it is situated, an order may be taken directing the auditor to issue his warrant to the treasurer to pay the proper authorities of New Jasper township, Greene county, Ohio, one-half of the collateral inheritance tax paid into the county treasury upon land situated in such township.

**RIGHTS CONFERRED UNDER EXCLUSIVE TERRITORIAL
GRANTS TO AGENTS.**

Common Pleas Court of Montgomery County.

H. F. VAN CLEAVE v. THE SPEEDWELL MOTOR CAR CO.

Decided, February 3, 1914.

Contracts—Granting the Exclusive Right of Sale within Prescribed Territory—Pertain to Territory and Not to Persons—Sales Not Covered Where Made to Residents of the Prescribed Territory by Other Agents in Other Territory.

Under a contract between a manufacturer and an agent, whereby the agent is granted the exclusive right to sell the product of the manufacturer "during the term of this contract in the following territory," the exclusive rights conferred have reference to territory and not to persons, and the agent is not entitled to commissions on sales made by the manufacturer or another agency of the manufacturer outside of the prescribed territory but to persons resident therein.

R. C. Patterson, for plaintiff.

McMahon & McMahon, contra.

SNEDIKER, J.

Plaintiff's claim is that while he was the agent of the defendant company, with exclusive right to sell its motor cars within his territory in the state of Missouri, another agent of the defendant, the Speedwell Motor Car Company of Illinois, sold to prospective purchasers with whom he had negotiated, and who lived within his exclusive territory so contracted to him, three of the cars of the company. He claims that under his contract he is entitled to the commissions for such sales. The defendant denies that either the plaintiff or the Illinois company was its agent, and denies that the cars were sold and delivered in the limits of plaintiff's territory; admits the delivery of the cars in the state of Illinois to the order of one Gavin living in that state, and claims that the cars were sold to Gavin by the Illinois company without any knowledge on defendant's part of any invasion of the plaintiff's territory.

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Our first consideration is of the contract between the plaintiff and the defendant. Whether plaintiff was in fact an agent of the defendant, or an independent dealer, can not, in our opinion, materially affect the rights under the agreement of exclusive territory. In either event the meaning and scope of that clause of the contract must be gathered from its terms, which are as follows:

"4th. The manufacturer hereby grants to the dealer the exclusive right to sell Speedwell motor cars, and parts thereof, during the term of this contract in the following territory," etc.

In granting such exclusive rights the company must have intended, and plaintiff must have understood, that so far as the company was concerned, no other person would be allowed to procure from it, or through its agents, a machine of the make specified, as a purchaser within the given territory. The company can not be construed to have contracted with respect to conditions beyond its control, nor to have intended to preclude itself from the conducting of business within other territorial limits. In other words, the exclusiveness of rights is *territorial* within fixed boundaries. It is not with respect to persons resident in a territory. It relates to place and not to individuals residing within the place.

It must have been on such considerations that the court held as it did in the 163 Cal., 102, in the case of *Haynes Auto Company v. Woodill Auto Company*, of which the syllabus is as follows:

"In the absence of any trade usage to the contrary, an agent to whom a manufacturing concern has given the exclusive sale of its products within a given territory, is not entitled to a commission on a sale made by the manufacturer outside of such territory to a resident thereof."

In the case at bar no such trade usage has been pleaded, and, therefore, no claim can be based thereon.

In 97 Ark., page 502, in the case of *Gay Oil Company v. Muskogee Refining Co.*, the court held that:

"Under a contract whereby defendant was given the exclusive right to sell plaintiff's oil in Arkansas no breach is proved by showing that plaintiff in good faith sold oil to a purchaser in another state and at such purchaser's request subsequently shipped such oil to Arkansas."

In the 55th Cal., 606, in the case of *Golden Gate Packing Company v. Farmers' Union*, the syllabus is as follows:

"The plaintiff agreed with the defendant that the latter should have the exclusive agency for the sale of the plaintiff's productions east of the state of California, for one year upon an agreed commission. *Held*: There was nothing in the agreement to prevent the plaintiff from selling his goods in any part of the world."

In 115 Mich., page 414, in the case of *Wyckoff, Seamans & Benedict v. Bishop*, the court hold that:

"An agent for the sale of typewriters, who, under his contract was to receive the benefit of all sales made in a given state, is not entitled to commissions on the sale of a machine by the maker to a purchaser in another state, merely because it is shipped by the purchaser to a branch office within the agent's territory."

These authorities seem to us to present the law applicable to the facts in this case. Indeed, they go so far as to preclude recovery in a case even more favorable than is here presented by this issue.

This view of the case makes the question of the relation of the Illinois company to the defendant unimportant, unless there was a conspiracy as between the defendant and the Illinois company to defraud plaintiff of his rights, which is neither claimed in the petition nor supported by any of the facts testified to in the case.

We do not regard as material the communication received by plaintiff from Mr. Stoddard, an officer of the defendant company. All of plaintiff's rights are fixed by his contract, and there is nothing before the court to indicate that at any subsequent period those rights were changed, or understood to be changed, between these parties.

This being our view of the case, our finding is for the defendant.

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**APPLICATION OF THE STATUTE OF LIMITATIONS IN CASE OF
A BREACH OF TRUST.**

Common Pleas Court of Hamilton County.

WILLIAM J. McCAULEY, RECEIVER OF THE NATIONAL ENDOWMENT
COMPANY, v. THE GERMAN NATIONAL BANK
OF CINCINNATI, ET AL.

Decided, November, 1914.

*Trusts—Breach of—Statute of Limitations Applicable. When—Statute
Not Tolled, Unless—Nature of an Action Brought by the Repre-
sentative of the Beneficiary.*

1. The statute of limitations constitutes a bar to all actions seeking to recover trust property excepting in those cases of direct and technical trusts cognizable alone in equity, and then only in case of fraud or concealment, or where there is no remedy by action at law to which time is expressly fixed, or where there has been no open denial or repudiation of the trust brought home at the time to the knowledge of the parties in interest.
2. Where the trustee of an express trust, upon receipt of trust funds, uses those funds to pay off his own obligations, as well as the obligations of others, incurred in the general course of the business out of which the trusteeship arose, the statute of limitations will commence to run against the beneficiary of the trust immediately upon the conversion of the funds where there is no fraud or concealment apparent on the part of him to whom the trust fund is paid.
3. Even if a person so receiving trust funds be deemed to be a trustee, he is not the trustee of such a continuing and subsisting trust as will toll the operation of the statute of limitations.
4. An action brought by the representative of the beneficiary to recover the fund so converted is not an action for relief on the ground of fraud, and therefore the statute of limitations commences to run from the time of the alleged wrongful conversion.

*Constant Southworth, John C. Hermann and Robert C. Sim-
mons, for plaintiffs.*

Stephens, Lincoln & Stephens, contra.

GEOGHEGAN, J.

This is an action brought by William J. McCauley, receiver of the National Endowment Company, a corporation under the laws of the state of West Virginia, against the German National Bank of Cincinnati, Ohio, and John R. Picton, as an individual and as trustee.

The German National Bank is defending the action, the said Picton having died prior to the trial thereof, and his administrator being in default for answer.

The facts upon which this action is based may be briefly stated as follows:

In the year 1891, a corporation known as the National Investment Company was incorporated under the laws of West Virginia. The business of the said National Investment Company was conducted from its offices in the city of Cincinnati, Hamilton county, Ohio, and consisted in the issuing of debentures, contracts of investment security or certificates, which business was declared unlawful by the Supreme Court of Ohio in the case of *State, ex rel, v. Interstate Savings Investment Company*. 64 Ohio St., 283, decided March 26, 1901. The National Investment Company carried on its business in the city of Cincinnati until the 4th day of December, 1900, when a suit was filed in the Superior Court of Cincinnati, seeking, among other things, the dissolution of the National Investment Company, the winding up of its affairs, the distribution of its assets, etc. The promoters of the National Investment Company were a number of men prominent in the business affairs of the city of Cincinnati, among whom were included George H. Bohrer, who was president of the German National Bank, the defendant herein, and John R. Picton, who subsequently became the president of the National Investment Company.

The evidence shows that while the suit that had been brought in the Superior Court of Cincinnati to dissolve the corporation was pending before a referee, John R. Picton, being desirous of continuing the business and having evolved a plan whereby this might be done without, as he concluded, running afoul of the law, in concert with a number of the directors of the National

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Investment Company formed a corporation under the laws of the state of West Virginia, to be known as the National Endowment Company.

At the time of the filing of the suit in the Superior Court of Cincinnati, the National Investment Company had on deposit with the treasurer of the state of Ohio a sum of money approximating \$55,000. This sum it had been compelled to deposit there for the purpose of doing business in this state. Simultaneously, therefore, with the incorporation of the National Endowment Company a circular letter was sent to all the debenture holders of the National Investment Company requesting them to assign to J. R. Picton, trustee, all their right, title and interest in certificates issued by the National Investment Company, including any proportionate share in all assets and funds on deposit with the state treasurer of Ohio or elsewhere in the name of the National Investment Company.

It was explained in this circular to these debenture holders that the litigation against the company had been protracted by the dilatory tactics of the prosecution; that the National Endowment Company had agreed to underwrite all the business of the Investment Company and had agreed to take over the certificates issued by the National Investment Company; that the National Endowment Company had been incorporated by the principal stockholders of the old company, that is, the Investment Company, and that to facilitate the early resumption of business the certificate holders were requested to sign a transfer enclosed and to return same, together with old certificates and unpaid dues. It was stated that the purpose of this transfer was to preserve their interest in the reserve funds of the old company for the benefit of the new certificates.

A great number of the debenture holders of the National Investment Company complied with this request and made the assignment, and to them were issued debentures of the new company, including a certificate in lieu of the amounts paid on their certificates in the old company.

However, a considerable number of the certificate holders in the old company did not comply with this request, and there-

upon Picton and his associates evolved the plan of buying out as many of these certificate holders as were willing to sell, the idea being to end the litigation which was then embarrassing the new company in the prosecution of its business. For this purpose J. R. Picton, Peter G. Thomson, H. G. Pounsford, D. James Davis, A. J. Parlin and George Kreis, being all directors of the National Investment Company, and also, with the exception of A. J. Parlin, directors of the National Endowment Company, gave their several notes amounting in all to \$35,000 to the German National Bank of Cincinnati. These notes were the individual obligations of the several persons whose names were signed to the notes, as it appears from the evidence that owing to the litigation then pending against the National Investment Company, the German National Bank would not lend anything to the National Investment Company upon its own responsibility. The money obtained in this manner was placed in the hands of W. C. Wachs, then cashier of the German National bank, as trustee, and with it the said Wachs proceeded to buy up the claims of those who did not transfer their old certificates to the National Endowment Company.

When the receivership proceedings against the National Investment Company were wound up in the Superior Court of Cincinnati, an order was made by that court that Picton, trustee, be paid the sum of \$16,156.23 out of the funds in the hands of the treasurer of the state of Ohio. An order was also made to pay to Wachs, trustee, out of said funds a dividend upon the amount of claims that had been assigned to him by those certificate holders who had not transferred to the new company and whose claims he had been able to buy up. The amount so ordered paid to him still left a deficit to the extent of \$10,885.21, which sum was the difference between what he received from the treasurer of state and the \$35,000 that had been made available to him by the giving of the notes to the German National Bank. At the same time the National Investment Company was indebted to the German National Bank upon its note for \$10,700, upon which a payment of \$3,000.00 had previously been made.

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On or about the 5th day of August, 1904, the treasurer of the state of Ohio sent a check payable to the order of John R. Picton, trustee, for \$16,156.23, being the amount that was ordered paid to him in the case in the Superior Court of Cincinnati, and the said check was endorsed and delivered by John R. Picton, trustee, to the German National Bank. Of the said sum, \$10,885.21, was applied to pay the deficit in the Wachs trusteeship fund, and the balance, \$5,271.02, was applied to the payment of the note of the National Investment Company in the hands of the German National Bank.

It may be stated is passing that neither the Picton trusteeship fund or the Wachs trusteeship fund received the amount from the treasurer of state that it had been anticipated each would receive for the reason that a large part of said fund in the hands of the state authorities was consumed by court costs, counsel fees, and other expenses, a thing not at all unusual but more than necessarily common in affairs of this kind.

It is upon this diversion of the amount received by John R. Picton, trustee, to the German National Bank, to pay off the notes held by it, both against the National Investment Company and the persons who created the Wachs trusteeship fund, that this action is brought, and the receiver, the plaintiff herein, seeks to recover the said amount, \$16,156.23, from the German National Bank, the prayer of his petition being that the German National Bank, and John R. Picton, individually and as trustee, be decreed to have taken said sum in trust for the benefit of the National Endowment Company and its certificate holders, and that the trust be terminated and that the trustee, John R. Picton, and the German National Bank be directed to pay over to the plaintiff, as such receiver, the said sum of money.

The German National Bank, in its answer, after setting forth facts which it relies on to justify the transaction, interposed the statute of limitations to this claim, claiming that the alleged cause of action did not accrue within four years from the time of the commencement of this suit, and that for more than four years prior to the commencement of this suit the officers and directors of the National Endowment Company had full informa-

tion and knowledge as to all the transactions between the said Picton and the German National Bank, and the said bank further sets up the plea of the six year statute of limitations.

Now, this action was commenced on the 17th day of November, 1911. The alleged misappropriation by Picton occurred on or about the 5th day of August, 1904, so that something over seven years had elapsed between the time that the defendant herein received the money from Picton and the time of the commencement of this action.

Two theories are advanced by the attorneys for the receiver herein, by which they seek to avoid the bar of the statute of limitations to the maintenance of this action. The first is, that this is a case of a continuing and subsisting trust against which the statute of limitations does not run; and the second is, that if it is not a case of a continuing and subsisting trust, why then it is an action for relief on the ground of fraud, which action is not barred until the expiration of four years after the discovery of the fraud.

I will take up these contentions in their order because it is obvious that unless the plaintiff can bring himself within either of the two classes his right to maintain this action is barred by the statute of limitations.

Now, is this a case of a continuing and subsisting trust?

An examination of all the evidence shows that if Picton was a trustee for any purpose at all, it was for the purpose of obtaining the portion of the fund in the hands of the state treasurer assigned to him and of transferring it upon its receipt to the National Endowment Company. I may say here in passing that a great deal of evidence was introduced and considerable argument made as to certain declarations made by Picton, in the circular letters he was responsible for, in his evidence before the referee, and in his answer and cross-petition filed in the case in the Superior Court of Cincinnati. From these statements and declarations, counsel for plaintiff draw a conclusion that Picton in some way or other was to preserve this fund as a separate and distinct entity for the benefit of those certificate holders who

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transferred to the new company. I do not think that a careful examination of all the evidence in this case warrants such a conclusion. It is clear that the object of the formation of the endowment company was the carrying on of the business of the old company for the benefit of those certificate holders of the old company who assented thereto and such other persons who during the course of the business would become certificate holders.

The business of the endowment company, which I have for convenience called the new company, was carried on from sometime in the year 1901 to July, 1909, and during that time a number of payments were made in accordance with its plans to old and new certificate holders, and a number of payments were made by them to the company. It seems that at the time the certificate holders in the old company transferred to the new company, it was their intention to become members of the new company and to benefit by what they expected to be a profitable speculation. They accepted in lieu of the amounts they had paid into the old company paid-up certificates and also the obligation of the new company to pay them in accordance with the plan of redeeming the debenture bonds or certificates that had been adopted as part of its scheme. They entered, with their eyes open, into the scheme of re-organization, and they understood that the object of the re-organization was to carry on the business just as it had been carried on before, but in such a way as not to come in conflict with the authorities of the state of Ohio, who would be compelled to enforce the rule laid down in the case of *State v. Interstate, etc., Company, supra*. It can not be conceived that it was ever intended, either by them or Picton, to preserve for them separate and distinct from the other assets of the new company their proportion of the fund that had been in the hands of the state treasurer and assigned by them to Picton. It was their intention that it should be transferred over and become part of the general assets or at least of a general reserve for the benefit of themselves and of future certificate holders who would by their coming into the company

enable the company to make that profit which would be applied to the payment of the certificates of the new company issued to them in lieu of their certificates in the old company.

So, it appears to me that the best that can be said for the claim of the plaintiff herein in this respect is, that the fund was to be obtained by Picton from the treasurer of state and by him turned over to the National Endowment Company as a part of its general reserve fund.

However, Picton did not do this. Immediately upon its receipt he turned it over to the bank in payment of the obligations of the investment company, that is, the old company, and of the individuals who had raised the money by their notes for the Wachs trusteeship fund.

If it can be claimed that this was a violation of his duty on the part of Picton, and the bank had knowledge of Picton's trusteeship, and that this fund was held by him in the capacity of trustee, it would create the bank a trustee by implication of law; but it is clear that one who is merely a trustee by implication of law is not the trustee of a continuing and subsisting trust, and unless he is the trustee of a continuing and subsisting trust can avail himself of such provisions of the statute of limitations as may apply to the particular facts of the case in hand.

This rule is clearly laid down by our Supreme Court in the case of *Paschall v. Hinderer*, 28 Ohio St., 568, at page 578:

"The law, as deduced from an examination of the cases, may be thus stated:

"That the statute of limitations did not apply in courts of equity to technical or direct trusts, except in either of the following classes of cases:

"First. When there was also a remedy at law to which a limitation was fixed. In such case the equitable action to enforce the trust has a like limit.

"In other words, the statute of limitations applies to those trusts which permit of remedy for the breach either at law or in equity; that is, where there is a concurrent jurisdiction.

"Second. In cases of trusts, where there is an open denial or repudiation of the trust brought home to the *cestui que*

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trustent, which requires him to act, and the time afterward elapsed amounts at law to a bar.

“Third. When circumstances exist which, with the lapse of time, raises the presumption that the trust has been discharged or extinguished.”

Now it is clear that the circumstances of this case do not bring it within that class of technical or direct trusts where there is no remedy at law to which a limitation has been fixed. The cause of action accrued herein as soon as Picton obtained possession of the money from the treasurer of state. The transaction between him and the bank constituted an effectual conversion of the deposit and if the bank accepted the money with knowledge of Picton's fiduciary capacity, why then the conversion constituted the bank, by operation of law, a trustee. And in passing here, I may say that the circumstances of this case convince me that knowledge of Picton's fiduciary capacity must be attributed to the bank by reason of George H. Bohrer's knowledge of all the affairs involving the National Investment Company's dissolution and the incorporation of the endowment company, but as a direct decision on this point is necessary in the view I have taken of this case, I do not wish to be considered as expressly determining that point.

Now I have said that this conversion constituted the bank by operation of law a trustee. The trust was not an express trust. The trust was not created by a contract, whereby the bank assumed the position and relation of a trustee, but the law imposed upon the bank, if it imposed anything at all under the circumstances of this case, the obligation which had attached to Picton as trustee of the fund, that is, to turn it over to the National Endowment Company.

The statute of limitations commenced to run against the National Endowment Company as soon as the right of that company accrued to demand from Picton the money which he had received from the treasurer of state, and unless it can be determined from the circumstances of this case that the cause of action accruing to the endowment company upon this conversion

was fraudulently concealed from it by the bank, the six year statute of limitations would be a bar to this action, the action accruing to the endowment company upon Picton's receipt of the money and his conversion thereof being an action wherein there was a remedy at law, to-wit: assumpsit, or it may be trover, or wrongful conversion.

This is in accord with the doctrine laid down in *Yearly v. Long*, 40 Ohio St., 27; *Douglas v. Corry*, 46 Ohio St., 349; *Welter v. Bible Society*, 50 Ohio St., 1; *Kane v. Bloodgood*, 7 Johnson's Chan., 90; *Finney v. Cochran*, 1 Watts and Serg., 112; *Roberts v. Ely*, 113 N. Y., 128; *Pierson v. McCurdy*, 33 Hun, 520; *Cooper v. Hill*, 94 Fed., 582; *University v. State National Bank*, 96 N. C., 280; *Haynie v. Hall's Ex'r.*, 5 Humphrey (Tenn.), 290; *Kennedy v. Baker*, 59 Texas, 150, and many other cases both in this country and in England too numerous to cite in this already too long opinion.

Referring, however, to the case of *Douglas v. Corry*, *supra*, which was a case where an attorney had collected money which belonged to the plaintiff, and which he was under the duty of turning over to her but which he did not do, it was held that it was not a continuing and subsisting trust which was capable of being enforced against his executor, and that the statute of limitations ran from the time the money was received and should have been turned over. The court, referring to the rule in equity that actions to enforce direct and technical trusts are usually not subject to the bar of the statute, says on pages 351 and 352:

"The provision of our code of procedure excepting from the statute of limitations 'the case of a continuing and subsisting trust' (Section 4974, Revised Statutes) is simply an incorporation of this rule. The word 'trust' is frequently used in a very comprehensive sense; and, as is well said in *Finney v. Cochran*, *supra*, to hold that the statute of limitations is not applicable to any case which may, even with propriety, be denominated a trust, would, in a great measure, defeat the plain and manifest intention of the Legislature. No equitable relief is required in his case; and the remedy adopted is a plain action at

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law for money had and received; and is not then a case of a continuing and subsisting trust cognizable only in equity."

The same doctrine prevails, with few exceptions, in all the cases that I have read and which were furnished me by the untiring zeal and industry of counsel in this case, and it seems to me that the clear weight of authority is that the statute of limitations will be a bar to all actions seeking to recover trust property, excepting in those cases of direct and technical trusts cognizable alone in equity, and then only in case of fraud or concealment, or where there is no remedy by action at law to which time is expressly fixed, or where there is no open denial or repudiation of the trust brought home at the time to the knowledge of the parties in interest.

Now it does not appear in this case that there was any circumstance of fraud or concealment that would toll the running of the statute as against the implied or constructive trust that the law would place upon the bank. However, it is not necessary at this point to discuss the evidence in this respect, as I will take it up more in detail in discussing the question as to whether or not this is an action for relief on the ground of fraud.

So, it seems to me that this can not be considered as a case of a continuing and subsisting trust.

Is this an action for relief on the ground of fraud?

In the first place we must determine whether or not on the part of the bank or its officers there was any fraud.

It is clear that the mere taking of the money by the bank, knowing at the time that Picton was a trustee, would not of itself justify the assumption that there was fraud on the part of the bank. We must examine all the circumstances surrounding the transaction in order that we may determine whether or not there was any fraud herein on part of the bank.

If we assume that the bank is chargeable with whatever knowledge its president, George H. Bohrer, had of all these transactions, what have we here?

It is clear that the primary purpose of the Picton trusteeship was to stop litigation and enable the certificate holders of the old company to be transferred, practically without interruption to their rights, to the new company. It was for the purpose of stopping litigation and the further embarrassment of the new company that the Wachs trusteeship was formed. The whole idea of the entire transaction, both on the part of the certificate holders and the directors of the old and new companies, was to evade litigation and the consequences of the ban that had been placed upon the business by our Supreme Court, and it was to accomplish these purposes that these trusteeships were formed.

Nowhere in the evidence does it appear that in so far as those certificate holders of the old company who transferred to the new company are concerned, they had any definite idea that anything would be particularly done with their proportion of the fund, then in the hands of the treasurer of state, other than that it would be transferred to the endowment company, and they entered the endowment company because in their opinion the endowment company would be able to carry out for them the contract of the investment company and thus enable them to make that profit which they had anticipated and speculated upon when they entered the investment company originally.

At the time of the creation of the Wachs trusteeship, Picton, who was the controlling spirit of this whole affair, guaranteed to the bank that he would back up the payment of the notes, that had been given to raise the funds to create the Wachs trusteeship, out of any funds that would come into his hands in the future. He also agreed to pay out of said fund any indebtedness which the investment company had contracted with the bank. The bank had been prevailed upon to forego presenting its claim against the investment company to the receiver of the investment company, and the only conclusion that it could come to was to assume that the endowment company was simply and solely a re-organization of the investment company.

The bank knew that Mr. C. B. Matthews was the attorney for both the investment company and the endowment company,

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that he had passed upon the legal aspects of and was partially responsible for the plans whereby the two trusteeships had been created, and that Mr. Matthews had passed upon the plans for the organization of the endowment company and upon the legality of its existence and its right to do business and that he in all affairs represented that company and its directors. Now, on the day, to-wit: August 5, 1904, when Picton endorsed the check received by him from the treasurer of state over to the bank, and the bank applied the proceeds of said check as hereinbefore indicated, the bank received from Mr. Matthews a letter stating in effect that the said J. R. Picton was authorized to make the application of the fund in his hands to the liquidation of the balance of the Wachs trusteeship claim and the note for \$8,000, which the bank was holding for some time. The bank did this, the accounts were carried through the books, and it is not apparent to me that any effort was made to conceal the transaction from anybody who might have an interest therein.

Though the manner of the bank in handling this transaction may not have been of the most approved methods of accounting, I can not be convinced that there is sufficient evidence in this case to justify me in holding that the bank was guilty of fraud against the certificate holders or the National Endowment Company itself.

Counsel for the plaintiff insists that the evidence is sufficient to justify the claim that there was fraud in the transaction to be attributable to the bank. He refers to a certain case brought by one Rist, one of the debenture holders of the old company, to enforce a stockholder's liability against the stockholders of that company. He points to what he claims to be a devious method on the part of the bank in carrying its account of the fund turned over to it by Picton. He suggests that it is suspicious that the bank would permit itself to hold the bag to the extent of the difference between the \$5,271.02, which was applied to the payment of the old company's note held by the bank, and the \$8,000 or more which was at the time due upon the note, and he points to other circumstances which he says are suspicious and raise the presumption of fraud.

I must confess that at the outset and before mature reflection upon the matter I was considerably impressed by his vigorous portrayal of these so-called suspicious circumstances, and was inclined to believe with him that they were badges of fraud. However, upon reflection, and having in mind the principle that fraud must be proved by clear and convincing proof, I have come to the conclusion that no substantial inference of fraud can be drawn from these circumstances. Fraud involves moral guilt or intention to do wrong. No such intention on the part of the bank plainly appears from the evidence. While the mere conversion of funds may give a right to a cause of action, this cause of action does not depend upon any moral obliquity on the part of the one guilty of the conversion or participating in it, but the law gives relief independently of any moral guilt and in cases of mere mistake as to one's right. The fact that I was impressed at first by the so-called suspicious circumstances, only goes to show how salutary is the rule that fraud must be proven by clear and convincing proof, because if it were not so, many otherwise reputable men, by reason of mere mistakes in transacting business, which might be calculated to arouse suspicion, would be adjudged guilty of fraud.

But even if it be assumed that the conversion by the bank was a fraud of the rights of the certificate holders, as claimed in the petition, the action herein sought to be enforced can not be considered as one for relief on the ground of fraud, but rather an action for trover or an action for money had and received.

In order to constitute the basis of an action for relief on the ground of fraud and to toll the running of the statute to the time that the fraud is discovered, the gist of the action must be fraud. Now the taking of property by force, or the wrongful conversion of property, are actions that were cognizable at law, and are not in the class of those cases which in equity were known as actions for relief on the ground of fraud, and while it is true that under the code actions for relief on the ground of fraud are not to be confined to cases which were formerly of exclusive cognizance in courts of equity, yet the term "relief

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on the ground of fraud" can not be extended to cases in which fraud is not the gist or foundation of the action. This principle is clearly set forth in *Howk v. Minnick*, 19 Ohio St., 462; *Carr v. Thompson*, 87 N. Y., 160; *Atchinson Railway Company v. Atchinson Grain Company*, 68 Kan., 585; *Brown v. Bank*, 2 Kan. App., 352; *Clausen v. Meister*, 93 Cal., 555.

In all these cases that section of the statute of limitations concerning actions for relief on the ground of fraud was discussed, and the statute under discussion was substantially the same as the statute in Ohio.

In *Carr v. Thompson*, *supra*, which was a case where an agent received money and by rendering false and fraudulent statements, and attempted to cheat and defraud plaintiffs obtained from them and converted to his own use upward of \$11,000, and the petition seeking to recover this amount was based upon his alleged fraud in the transaction, the court in its opinion said in referring to the cause of action stated in the petition:

"An allegation of fraud was in no sense essential to its perfect and correct statement; it could stand without it; omitting every such allegation it could still successfully defy a demurrer; it can not be said to be founded on fraud, when that element is not essential; the proof of fraud becomes only necessary as the fit answer to a possible defense. * * * So that the sole question presented is, whether the defendant, acting as an agent, properly performed his duty in such relation, and if he failed so to do, is liable, whether such failure was intentional and fraudulent, or not."

However, as I said before, even though this be regarded as an action for relief on the ground of fraud, and I am of the opinion that it can not be so correctly regarded, I am of the opinion that the plaintiff has failed to prove fraud. It has become so trite in Ohio that it needs no citation of authority to support it, that fraud is never presumed but must be proved by clear and convincing evidence. I take this to mean that the circumstances brought forward in the evidence must be of such a nature as to leave no fair or reasonable inference to be drawn

from them other than the inference of fraud. This does not appear clearly to me. The burden of proving it is upon the plaintiff, and he must produce that measure of proof which the law requires in cases of fraud. The burden is also placed upon him, where he claims fraud, of not only proving the fraud but of proving that he did not discover the fraud until within four years of the time when the action was brought. *Combs v. Watson*, 32 Ohio St., 228.

This is not only the rule in Ohio, but seems to be the rule laid down by many respectable authorities in other states having codes similar to that of Ohio. *Morrill v. Little Falls Mfg. Co.*, 53 Minn., 371; *Hooker v. Worthington*, 134 N. C., 283; *Arnett v. Coffey*, 1 Col. App., 34; *Castro v. Geil*, 110 Cal., 292.

Now in this connection there can be no doubt but that the order of the Superior Court of Cincinnati directing the treasurer of state to pay a portion of the fund in his hands to Picton, trustee, was made in a matter wherein the court had jurisdiction, and in a case wherein all of the certificate holders of the investment company were interested, by reason of the fact that the action was brought on their behalf by the plaintiff, who himself was a certificate holder. The receipt of the money under that order can not be said to have been concealed from anyone, because it was a matter wherein a proper and duly accredited officer of the state of Ohio performed a function of his office by and under the authority of an order of a court of competent jurisdiction. Therefore, anyone who had the desire could have known of the receipt of the money. While it is true that two of the certificate holders of the investment company, who transferred to the endowment company, testified that they had no knowledge of this transaction, I do not think this is evidence sufficient to justify any assumption that anything was done by Picton or the bank to conceal the transaction from the officers and members of the endowment company. So, it would seem that even in this respect the burden placed upon one alleging fraud, by the doctrine laid down in *Coombs v. Watson*, *supra*, has not been sustained here.

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I am not aware that the rule laid down in some states, that a person alleging fraud must not only show that he did not discover it, but also that he exercised reasonable diligence to discover it, is the law of Ohio, but I think the rule is that the person alleging fraud has upon him the burden of proving that he did not discover the fraud within four years from the time when the action was brought.

Some reference has been made to the case of *Winder v. Scholey*, 83 Ohio St., 204.

That was a case where the defendants had obtained property from a testator by a promise to hold it in trust for the benefit of the testator's lodge. They denied the trust. The action was one to enforce it. Their obtaining the property on such express promise and their failure to carry out the promise constituted undoubted fraud. The action was between the trustees and the *cestui que trust*, and was to enforce a direct or technical trust which had been created by a contract between the trustees and the creator of the trust, and which the trustees were fraudulently seeking to avoid.

I can not see where the decision of that case has any particular bearing upon the case at bar.

I am well aware that the various propositions that I have endeavored to lay down as applying to the circumstances that are before me in this case have been in some measure or other disputed by eminent authority. I have felt that it was my duty, in view of the splendid efforts made by all the counsel concerned in this case, to read every case and every authority that has been cited to me. As these undoubtedly embraced every decision upon the principles herein involved in this Union and even in England, it can be seen that the task that was placed upon me was no easy one, but I am convinced that the principles which I have applied in this case are supported by the great weight of authority and are correct.

Therefore, the petition of plaintiff will be dismissed, as well as the cross-petition of William L. Meyer, a defendant herein, and judgment will be entered for the defendant the German National Bank, for its costs.

**CLAIM FOR BREACH OF CONTRACT DEFEATED BY
ACQUIESCENCE.**

Common Pleas Court of Franklin County.

**CLAUDE A. ARMSTRONG v. THE FIRE PROOF WAREHOUSE
& STORAGE CO.**

Decided, January Term, 1915.

*Breach of Contract—Estoppel Against Claim for Damages—Growing
Out of Reduction of Salary Contrary to Terms of Agreement.*

Inasmuch as a plaintiff can not acquiesce in a breach of his contract and still rely upon it and claim damages for the breach, an action does not lie for breach of a contract of employment for a two year period at a stipulated salary, where the plaintiff left the employment during the second year because of a reduction in his salary but accepted payment at the reduced rate from the time the reduction was made until he gave up the employment.

R. M. Lucas, for plaintiff.

H. F. West and *W. B. Cockrell*, contra.

KINKEAD, J.

The petition of plaintiff is as follows:

“Plaintiff avers that on or about the 8th day of March, 1913, he entered into a written contract of employment with the defendant herein, wherein said defendant agreed to employ him for a period of two years from and after March 15, 1913, as assistant manager, and further promised and agreed to pay said plaintiff for the first year of his employment under said contract the sum of fifteen hundred dollars (\$1,500), payable at the rate of one hundred and twenty-five dollars (\$125) per month at the end of each and every month; and for the second year’s employment under said contract the sum of eighteen hundred dollars (\$1,800) payable at the rate of one hundred and fifty dollars (\$150) per month at the end of each and every month.

“Plaintiff further avers that he entered into the employment of said defendant as assistant manager on March 15,

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1913, as provided in said contract, and continued in the employment of said defendant under said contract until the 12th day of May, 1914, on which date said defendant informed plaintiff that it would not pay plaintiff the stipulated amount of compensation for the second year's employment provided in said contract above mentioned, to-wit: the sum of one hundred and fifty dollars (\$150) per month, and that it would only pay plaintiff the sum of one hundred dollars (\$100) per month for his services to be rendered after said date, and for services which plaintiff had rendered since the 15th day of March, 1914; that said action on the part of said defendant was wrongful and without cause and in violation of said contract above mentioned. Plaintiff further avers that he was ready and willing to remain in the employment of said defendant under and pursuant to the terms of said contract but that by reason of the violation thereof by said defendant as above mentioned, he was compelled to and did on said 12th day of May, 1914, leave the employment of said defendant.

"Plaintiff further avers that immediately after said date he used due diligence to secure other employment, and that on June 29, 1914, he secured employment at the rate of fifty dollars (\$50) per month in which employment he has continued to the present time.

"Plaintiff further says that he has been paid in full by the defendant for services rendered by him to the 15th day of March, 1914, and that he has been paid the further sum on account for services rendered by him since said date for said defendant, the sum of one hundred and sixty dollars.

"Plaintiff further says that by reason of said wrongful conduct upon the part of said defendant, he has been damaged in the sum of twelve hundred dollars (\$1,200).

"Wherefore, plaintiff prays judgment against said defendant in the sum of twelve hundred dollars (\$1,200) and costs of suit."

A demurrer is filed to the amended petition. The contract of employment was for a period of two years from and after March 15, 1913, at \$125 per month. Plaintiff avers that he entered upon the employment, "and continued in the employment of said defendant under said contract until the 12th day of May, 1914, on which date said defendant informed plaintiff that it would not pay plaintiff the stipulated amount of compensation for the

second year's employment," etc., and that it would pay only \$100 per month.

He alleges that he has been paid in full for services rendered by him to the 15th of March, 1914, and that he has been paid the further sum on account for services rendered by him since said date, the sum of \$160. But he fails to state when this payment was made.

He avers that the action of defendant in informing him that he would not pay the amount stipulated but only \$100 "was wrongful and without cause and in violation of said contract." This is a conclusion, and not a sound one. He says that he has been paid in full by the defendant for services rendered to the 15th day of March, 1914. He says "he was compelled to and did on said 12th day of May, 1914, leave the employment." This is also partly a conclusion.

It is apparent that plaintiff's theory is that defendant having informed him that it would not pay him the \$125 per month as agreed upon, this alone constitutes a breach of the contract.

The payment of \$160 was \$2.50 less than a month and a half's pay at the rate of compensation for the first year. He states that he received the \$160 since March 15, 1914, but fails to state whether he received it on May 12, when he quit, or since that date. In either event it would make no difference. If he accepted this money after quitting the service he must be held to have received it in satisfaction of his claim against defendant. In the absence of a clear statement concerning this payment and the circumstances under which it was received, it is to be assumed that he is estopped to claim damages. It seems evident that he accepted it according to the rate of compensation for the first year.

If he accepted full compensation for the actual time he served defendant before quitting or at the time he left, or accepted such sum as satisfaction; if he received the last payment after he left the employment, he is estopped now to claim damages for the breach. The doctrine of *James v. Allen County*, 44 O. S., 226, would apply equally as well to such a situation as to the

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conditions in that case. Plaintiff can not acquiesce in a breach of his contract and still rely upon it and claim damages for a breach.

A mere declaration by a master that he will no longer pay the stipulated amount of compensation, followed by acceptance of full compensation of the servant to the date of leaving the service, either at that time or subsequent thereto does not entitle the servant to maintain an action for a breach of the contract.

1 *Labatt M. & S.*, Section 187, and 128 Ga., 40, cited by counsel do not contemplate such a situation. It may be that when an employer declares he will no longer pay the stipulated compensation the employee declines further to act under his contract, and declines to accept compensation under it, there might be legal cause for complaint. But this is doubtful in a transaction of this character. The rights and obligations are not to be determined by mere declarations, which at best are to be regarded as evidence of intent if having reference to the future. Certainly no breach of a contract of employment can occur until the master has actually failed by his act to perform his part thereof. If then the servant, influenced by the oral declaration of the master, quits the employment before the time when by the contract anything is due him, and accepts compensation therefor, such compensation not being paid pursuant to the contract but in breach thereof, the servant has no right of action for a breach of contract.

The demurrer to the petition is sustained, and the action is dismissed.

RIGHT OF A COURT TO COMMIT FOR CONTEMPT.

Hamilton County Court of Common Pleas
(Division of Domestic Relations).

STATE OF OHIO V. ROBERT SPEISER.

Decided, April, 1915.

Contempt of Court—Statutory Penalty a Fine Only—But the Court Has Inherent Power to Make the Punishment Effective by Commitment.

A court has power to commit one found guilty of contempt, where the fine imposed therefor remains unpaid.

Thomas H. Darby and Coleman Avery, for the State.
Stanley Matthews, contra.

HOFFMAN (Charles W.), J.

In this case the defendant has pleaded guilty to a charge of contempt of court in that he violated his duty as a juror. A fine of \$250 was imposed, and the question now before the court is whether the defendant may be committed to jail until the fine is paid, or he is otherwise discharged according to law.

Section 11441 of the General Code provides that—

“A juror, who after being qualified, refuses or neglects to obey or observe any order or injunction of the court, may be fined as for a contempt, not more than one thousand dollars.”

Section 11442 stipulates that—

“Any fine assessed for a contempt, against a person summoned, or who has qualified as a juror, may be collected by execution, and shall be paid into the county treasury and disbursed as other fines.”

It is contended by the defendant that, inasmuch as these sections do not specifically provide for imprisonment for the non-payment of the fine, the court has no power to impose this penalty.

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There are no decisions in this state bearing directly upon this point. The general rule in criminal procedure is that the court has no power to commit for the non-payment of a fine. In the case of *Longes v. State*, the court said that "in this state the whole matter is regulated by positive law." It will be found, however, that the cases discussing the subject refer more particularly to felonies and misdemeanors as defined by statute.

In *Smith v. State*, 4 C.C.(N.S.), 101, the point in issue was the right of the court to imprison for failure to pay a fine in a felony case. That this was the only point considered is clearly shown in the syllabus, which is as follows:

"The statutory provision that a convicted person may be imprisoned until his fine and costs are paid applies only to misdemeanors, and where such an order is made a part of the sentence of one convicted of a felony, error will lie to a refusal to eliminate that portion of the sentence."

There are two cases which, it is claimed, finally settle the question as to the right to commit upon the non-payment of a fine in a contempt proceeding. The first is the case of *Lubbering v. State*, 19 C. C., 658. It is expressly stated in this case that "the only contempt charged against Lubbering which the court found him guilty of was not paying \$4.50 alimony to the wife," and the court decided that this being the only charge of contempt, the defendant could not be imprisoned for non-payment of the fine of \$25 and costs. It is certainly not decided in this case that under no circumstances could a court imprison for non-payment of a fine.

Sections 11441 and 11442 above quoted are similar to the statutes upon this subject in a number of states and there is no statement in the circuit court cases that imply that these statutes should be construed other than the federal courts and the courts of other states having similar statutes have invariably construed them.

It is conceded that all parties to a cause before the court are entitled to a fair and impartial hearing. If this right were not jealously and securely guarded, all governmental functions

would fail. The court under the common law, and in accordance with the general practice in legal procedure, has full and ample power to insure the plaintiff and defendant a fair trial. While it may be, at times, considered dangerous to invest a court with this power, the danger is not so great as that of the possibility of undermining our whole system of trial by jury if this power were withheld.

The Legislature provided in Section 11441 that a fine of not more than \$1,000 might be imposed. In the case at bar the fine is \$250. The statute was enacted in order that the integrity of juries might be maintained; the statute would have utterly failed to have accomplished its purpose if the only method of collecting the fine was by execution. The inflicting or the assessing of the fine is of no consequence; only its payment can be considered as punishment. It is said in *Fisher v. Hughes*, 6 Fed. Rep., 63:

“The payment of the fine is the punishment. The awarding or infliction of the fine is no punishment. The commitment is an incident of the fine. It is not in any manner the imprisonment allowed by the statute.”

In the same case the court says:

“It is lawful for the court inflicting the fine to direct that the party stand committed until the fine be paid, although there be no specific affirmative grant of power in the statute to make such deduction.”

In *Kanter v. Clerk, etc.*, 108 App., 287-303, it is held:

“Where a fine is imposed, it is the punishment ordered and the commitment is but an incident * * *; this is the established doctrine of the common law.”

The case of *Fisher v. Hayes* was cited with approval in the case *Ex parte Karlson*, 160 Cal., 378, which is a case directly in point. It is said in the syllabus:

“The provision of Section 1007 of the Code of Civil Procedure, than an order for the payment of money may be enforced

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by execution against property, is merely a cumulative remedy for the enforcement of the fine.

"Crimes Punishable by Statute—Contempts Under Code of Civil Procedure.—The declaration of the Penal Code to the effect that no act shall be punishable as a crime except such as may be made a crime by statute, and then only in the manner prescribed or authorized by statute, does not apply to contempts punishable under Section 1209 of the Code of Civil Procedure, and the question whether the particular act is punishable as a criminal contempt or not, under Section 166 of the Penal Code, is immaterial to any inquiry arising in a contempt proceeding under Section 1209."

It is contended that the Karlson case is based on the fact that the common law of England is made by statute a part of the law of California. There is nothing in the opinion to indicate that this fact influenced the court, or that the decision would have been different had such a statute not been in existence. It is said in the opinion:

"It is in this view that it has been always held that where a statute authorizes or prescribes the infliction of a fine as a punishment, either for a contempt of court or for a defined offense it is lawful for the court inflicting the fine to direct that the party stand committed until the fine be paid, although there is no specific affirmative grant of power in the statute to make such direction.

"In many cases an execution would be an ineffective means for the collection of a fine, the property of persons of wealth is often beyond reach of execution."

The syllabus in the case of *Ex parte James L. Chittenden*, 62 Cal., 534, is as follows:

"Upon a judgment imposing a fine for contempt it is competent for the court to direct that the party stand committed until the fine be paid."

This case cites and comments on the following cases which in substance hold that a party in contempt may be committed upon non-payments of a fine: *New Orleans v. Steamship Co.*, 20

Wall., 392; *In Costys Case*, 3 Wils, 188; *Fisher v. Hughes*, 6 Fed., 63.

It would be superfluous to cite and to comment in this opinion upon the cases, in many states, which are practically in harmony with the views expressed in the cases herein cited.

The Legislature of Ohio in common with other states enacting statutes such as 11441, did not provide for commitment on non-payment of the fine. In the light of *Hale v. State*, 55 O. S., 210, and *State v. Runyon*, 64 O. S., 610, it would have been superfluous to have done so. The court in the *Hale* case held that the Legislature in cases of this character can not abridge the power of the court. That it is not a question of jurisdiction but of inherent power in the court, etc.

It is the opinion of this court that in the case at bar, a fine of \$250 is reasonable, and that the defendant may be committed to jail until the fine is paid or he is otherwise discharged according to law. An entry may be so drawn and presented.

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Ward v. Eld Steel Co.

**AMENDMENT OF PETITION BY PLAINTIFF'S
ADMINISTRATOR.**

Superior Court of Cincinnati.

JAMES T. WARD v. THE L. ELD CONCRETE STEEL COMPANY.

Decided, March 12, 1915.

Amendment—Only Limitation that Original Cause of Action Must Not be Changed—Both Parties Have an Interest in a Release—And its Production May be Required for Purposes of Inspection—Sections 11363 and 11552.

1. A pleading may be amended by interlineation even after the death of the plaintiff and the substitution of his administrator, where the amendment does not substantially change the cause of action and where it merely makes the grounds of complaint more definite and certain.
2. Where defendant pleads a release given by plaintiff's intestate in his lifetime, plaintiff may by motion require the defendant to permit an inspection thereof. Such release can not be said to be a confidential communication nor to relate exclusively to defendant's case. *Ex parte Schoepf*, 74 O. S., 1, distinguished.

Jackson & Woodward, for the plaintiff.

Cohen, Mack & Hurtig, contra.

OPPENHEIMER, J.

1. Since the institution of this action plaintiff has died, and James M. Stone, his duly appointed administrator, has been substituted as party plaintiff. He now seeks leave to amend the petition by interlineation, adding first an allegation that the board which is alleged to have broken and caused the mishap "was partly sawed out or cut in two," and by alleging that certain internal organs of the decedent, not mentioned in the petition, were affected by the fall, and by alleging that certain wages were lost to him during his lifetime.

Defendant opposes the motion upon the ground that since the original plaintiff has died, it would be improper to permit

amendments at this time. Defendant suggests that if these allegations had been made during plaintiff's lifetime his deposition might have been taken for the purpose of ascertaining certain facts; that as this information is now unavailable it would be unjust to present new allegations the truth of which defendant has had no opportunity to investigate.

We do not understand that there is any such limitation upon plaintiff's right to amend. Under favor of Section 11363 of the General Code, any pleading may be amended by inserting allegations material to the case. It is conceivable that information concerning a cause of action might frequently be obtained after the death of one of the parties; and if the pleading could not be amended by inserting allegations covering the newly-discovered facts, substantial injustice might result. We have searched the books carefully, and find no case in which the limitation for which defendant contends has been recognized. Courts are usually very liberal in the matter of permitting amendments to pleadings, and will in general impose only the limitation that the original cause of action shall not be substantially changed, nor a new cause of action introduced. Under the decisions in this state even a change in the nature of the claim or defense is permitted provided such change is not attempted after testimony is introduced. This is true even though the amendment be inconsistent with the original petition (*Root v. R. R.*, 45 O. S., 222; *Raymond v. R. R.*, 57 O. S., 271). And where the amendment is made for the sole purpose of making the grounds of complaint in a tort action more definite and certain it should unquestionably be permitted. *Ry. Co. v. Burnham*, 123 Ia., 28; *Smith v. Electric Co.*, 188 Mass., 371.

2. The second question which is now presented is of more difficulty. Defendant in its answer pleads a release given by Ward to it on June 17th, 1911, in which he is alleged to have discharged it of all claims and demands growing out of the mishap. Plaintiff now files a motion to require defendant to permit an inspection of this release. Defendant refuses to accede to this demand upon the ground that the release is "a pure de-

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fense" which, under the doctrine of the case of *Ex parte Schoepf* 74 O. S., 1, it can not be required to produce. Section 11552 of the General Code of Ohio provides that "either party * * * may demand of the adverse party an inspection and copy * * * of a book, paper or document in his possession, or under his control, containing evidence relating to the merits of the action or defense, specifying the book, paper or document with sufficient particularity to enable the other party to distinguish it." This statute is applicable to all classes of cases, whether they are tried by the court or by a jury. It gives substantially the same relief as was formerly administered in chancery by a bill of discovery (*Mill Co. v. Guaranty Co.*, 11 C.C. [N.S.], 443). The rule in chancery, however, was never extended so far as to permit a discovery of any facts or documents which were not material or necessary to plaintiff's case. Plaintiff could not require the defendant to disclose to him the manner in which he expected to establish his defense, nor to give evidence which related exclusively to his (defendant's) case, but the plaintiff was at all times permitted under the chancery practice to require a disclosure of those documents in which both parties had an interest, such as contracts and agreements.

In the case at bar it seems that the release set up by the defendant is a document of the character last mentioned. It is alleged to have been executed by plaintiff himself, therefore it can not be looked upon as something the character of which is secret, and the contents of which plaintiff had no right to know. It is a document originally executed by plaintiff for a valuable consideration, and delivered to defendant. While it is of evidentiary value to defendant, and while it may form the basis of his defense, there are circumstances under which it might not refer or relate exclusively to defendant's case. For example, if plaintiff were to have alleged in his petition that a release had been given which was voidable, and if he were to seek to have it set aside, as he would be required to do under those conditions set out in the case of *Perry v. O'Neil*, 78 O. S., 200, he might undoubtedly allege that the release was in the possession

of defendant and require its production. So in this case, the plaintiff having died, it seems to be proper for his representative to require the production of the document which he is said to have executed for the purpose of identifying the signature and ascertaining the contents.

The Schoepf case can not be said to go further than the facts demand. It grew out of an attempt to require the defendant to produce a confidential report of an accident made by him in accordance with a rule of his employer, and containing the names of witnesses. This attempt was made in the course of a "fishing expedition." The decision was indeed contrary to the line of authorities even in such cases (see case note in 6 L.R.A. [N.S.], 325). It will certainly not be carried further than its facts require, and made to extend to a document executed by plaintiff, but in defendant's possession or under his control.

The motion to require production of the release will therefore be granted.

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Galbreath v. Hanson.

**CONSTRUCTION OF THE REQUIREMENT AS TO THE IMMEDIATE
ENTERING OF JUDGMENT BY A JUSTICE.**

Common Pleas Court of Franklin County.

W. F. GALBREATH v. STEPHEN HANSON.

Decided, January Term, 1915.

*Judgment by Justice of the Peace—Mandatory Requirement That It
Shall be Entered Immediately, When.*

The provision of Section 10378, General Code, that when trial is had before a justice of the peace, judgment must be entered immediately after the close of the trial, if the defendant has been arrested or his property attached, is mandatory and requires that a judgment in such a case which was not entered immediately after the close of the trial must be reversed.

J. M. Schooler and A. H. Johnson, for plaintiff in error.

Thomas & Hayes, contra.

KINKAD, J.

This is a proceeding in error to reverse a judgment of a justice of the peace, for alleged non-compliance with Section 10378 General Code. This provides:

“* * * When the trial is by the justice, judgment must be entered immediately after the close of the trial, if the defendant has been arrested or his property attached. In other cases, it shall be entered either at the close of the trial, or if the justice then desires further time to consider, on or by the fourth day thereafter, both days conclusive.”

In this case, in which property was attached, the trial was had October 30th and 31st, and was continued for decision to November 2d, 1914, at which time decision was rendered.

Jurisdiction of justices being statutory must be followed strictly to constitute a proper exercise thereof. It has been the course of decision that a justice loses jurisdiction by continuing this class of cases beyond the date of concluding the trial for de-

cision. *Nicholson v. Roberts*, 4 N. P., 43; *Tussing v. Evans*, 17 C. D., 685.

This is a harsh and unjust rule, but it is none the less the duty of courts to enforce it. The clear proposition is whether the statute is directory or mandatory. A directory provision is one the observance of which is not necessary to the validity of the proceeding. A mandatory provision in a statute is one the omission to follow which renders the proceeding to which it relates illegal and void. The character of a statute, whether mandatory or directory, does not depend upon its form, but upon the legislative intent. This is to be found in the object and purpose of the act, and the consequences that may follow the two interpretations.

If a provision relates to some immaterial matter, compliance with which is a matter of convenience rather than substance; or if the directions of a statute are prescribed merely with a view to the proper, orderly, and prompt conduct of business, it is to be regarded as directory. It is familiar that the words "shall" and "must" are constantly used in statutes without regard to their literal meaning.

The provisions of Section 10378 seem clearly to indicate a mandatory character. They seem designed to specifically require that judgment *must* be entered *immediately* after close of trial, in cases where defendant has been *arrested* or his *property attached*. He is not given option in this class of cases to continue the case for further decision, as is done with reference to "other cases." The purpose is not to hold a person under arrest, or property attached beyond the date of trial. This purpose, together with the optional provision authorizing a justice to either decide at once, or to continue the case for a period of four days to consider it, clearly shows that it was not intended that the act was to be directory. It is mandatory, to be followed strictly.

The judgment is therefore reversed.

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Goebel v. Cleveland Railway.

HOME RULE AS EMBODIED IN MUNICIPAL CHARTERS.

Common Pleas Court of Cuyahoga County.

EMIL GOEBEL V. THE CLEVELAND RAILWAY COMPANY.

Decided, April 1, 1915.

Local Government Under the Amended Constitution—Municipal Charters—Provisions of, Preval Over Legislative Acts—Extent of Powers Which May be Granted—Delegation of Sovereignty—Franchises Distinguished from Contracts—Obtaining of Consents from Abutting Property Owners to the Building of a Street Railway—Not Required Under the Cleveland Charter—Evils Abated Thereby—Right to "Consent" Not a Property Right.

1. A municipality which has adopted a charter under the Home Rule Amendment has the same power to legislate, through its council and within the provisions of its charter and the state Constitution, as has the General Assembly to exercise such power; and the provisions of its charter in effect operate as a repeal of statutes in conflict therewith.
2. The test whether a municipality which has adopted a charter is acting beyond the scope of its authority must be determined by reference to the state Constitution, and not to acts of the Legislature.
3. Under the provisions of the charter adopted by the city of Cleveland an agreement may be entered into between the municipality and a street railway company whereby the latter may build a street railway line, under the conditions imposed by said agreement, along a designated street or streets without first obtaining the consent of the abutting property owners.

*Hoyt, Dustin, Kelly, McKeehan & Andrews, for plaintiff.
Squire, Sanders & Dempsey, contra.*

VICKERY, J.

The plaintiff is an abutting property owner of premises on Archwood avenue in the city of Cleveland, and brings this action to obtain a permanent injunction to restrain the defendant from laying its tracks in a portion of said street.

Plaintiff alleges that he uses Archwood avenue as a means of ingress and egress to and from his premises, and unless the laying of the tracks is enjoined, the plaintiff will suffer irreparable injury.

It is averred in the petition that the defendant failed to secure permission from the city council of the city of Cleveland to construct said tracks, in accordance with Section 3768 of the General Code of Ohio; and further, that defendant failed to secure the written consent of a majority of the abutting property owners on said street, as required by Section 3770 of the General Code of Ohio.

The answer of the defendant admits the ownership of the premises, as alleged in the petition, and admits that unless it is enjoined it will construct and operate a single-track line of electric railway in Archwood avenue. Defendant admits that there was not filed the written consent of a majority of the abutting property owners along the line of said railway. The answer also sets up as an affirmative defense that the defendant obtained the right to construct the proposed railway from ordinance No. 32925 of the city council of Cleveland, passed May 18, 1914. And in said answer it is alleged and averred that on July 1, 1913, the electors of Cleveland adopted a charter, which provides that the consent of abutting property owners shall not be required for the construction of a public utility, unless such public utility constitutes an additional burden on the rights of the property owners. It is also averred that the proposed line of railway is not an additional burden upon the rights of the property owners.

To this answer the plaintiff has demurred, on the ground that it does not constitute a defense to the action; and this case was heard upon that demurrer, and the questions raised are, whether or not the charter adopted by the voters of the city of Cleveland, with respect to the obtaining of the consents, shall prevail; or whether the sections of the General Code, to-wit, 3768-3777, shall prevail. The arguments in the case have taken a wide scope, for it raises the question as to whether or not the people

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of Cleveland obtained any rights under the charter which they did not have under the statute; or whether, so far as local government is concerned, the charter supersedes and in effect abrogates the statutes upon that question. These questions involve a discussion and thorough understanding, not only of what is local self-government, but also a construction of some sections of Article XVIII of the amendments to the Constitution, and of Section 3370 of the General Code.

In approaching these questions, I do so fully understanding the duties of the court, and having a firm conviction that the three co-ordinate branches of our government should be preserved, that is, the legislative, the executive and the judicial; and, speaking more particularly of the legislative and judicial, I have a firm conviction that the court should not interfere with the legislative department of the government, unless the legislation is clearly inhibited by the Constitution. It is no part of court's duty to seek to override the legislative part of the government, simply because he may not agree with the legislation or the trend of legislation. This proposition was well amplified a long time ago by Chancellor Day of the Supreme Court of New York, in a case against the city of New York, where legislation sought to make the city liable for damages done by mob violence. Our own Supreme Court, in the case of *Caldwell v. Commissioners of Cuyahoga County*, laid down the same doctrine. I myself argued that case in the Supreme Court. And it has been decided by the courts of every state in the Union that the courts have no business to interfere with legislation simply because the court does not agree with the policy of the legislation, unless it was clearly in contravention of the Constitution or other laws of higher import.

So we will regard it as settled that, no matter how unwise the legislation may be, no matter how much the court may disagree with the legislation, it is not its province to interfere with the legislative department, unless such legislation clearly contravenes the Constitution.

Coming now to the question before us with this in mind—

what was the purpose of the amendment to the Constitution which provided for home rule for cities in the state of Ohio?

Section 1 of Article XVIII provides for the classification of cities, and there is a uniform classification into cities and villages.

Section 2 provides that general laws shall be passed to provide for the incorporation and government of cities and villages; and provides that additional laws may be passed for the government of municipalities adopting the same; but no such additional law shall become operative in any municipality until it shall by a majority of those voting thereon under regulations to be established by law.

Section 3 is the section particularly under fire in this litigation. It provides that "municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce, within their limits, such local police, sanitary and other similar regulations as are not in conflict with general laws."

Then two questions arise as to this action: First, is the granting of a franchise by the city of Cleveland to a railway company to lay its tracks on one of the streets a matter of local self-government? Second, if it is a matter of local self-government, whether or not the exercise of that power by the municipality is subject to the general laws of the state of Ohio.

A proper answer to these questions will settle the law as to this case.

It is argued upon the part of the city, which has filed a brief in this case, and also upon the part of the railway company, the defendant, that the restriction contained in Section 3 relates only to the exercise of power by the municipality over the police, sanitary and other regulations. There is also before the court a copy of a brief filed in the Supreme Court of Ohio in case No. 14791, now pending there, *State of Ohio, ex rel George D. Hile, v. Newton D. Baker, Mayor of the City of Cleveland, a municipal corporation, Thomas Coughlin, and W. F. Thompson*. This action was brought by Hile as a tax-payer to knock

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out the sinking fund commission provided for in the city charter, holding that the taxation question is a question beyond the power of municipalities to affect by a charter, that it is clearly a state function, and taxation should be uniform throughout the state. And they base their argument upon Section 1 of Article XIII of the Constitution, which provides that the General Assembly shall pass no special act conferring corporate powers; and Section 6, which provides that the General Assembly shall provide for the organization of cities and incorporated villages by general laws, and restrict their power of taxation, assessment, borrowing money, contracting debts and loaning their credit so as to prevent the abuse of said power. I have quoted the articles that existed prior to the amendment.

The question presented is, how far these provisions of the Constitution have been changed or modified by Sections 3 and 7 of Article XVIII, one of the late amendments to the Constitution. It will not be necessary for me to decide that question here, for I think there could be a clear distinction drawn, if it were necessary, between the taxing power and the power of the city over its streets with respect to the laying of street car tracks.

One of the things to which my attention has been directed is the debate in the constitutional convention over the proper construction of Section 3, the home rule amendment. Indeed one of the ultra home-rulers, Mr. Fitzsimmons of this city, introduced a bill, after the convention had agreed upon the wording of Section 3 and Section 7, to place a comma after the words "local self-government" in Section 3; and that bill provoked a warm discussion as to what was meant by the term local self-government, and whether or not the limitation upon a municipality over the police, sanitary and other regulations applied to other things relating to municipal affairs. I have a keen admiration for one of the men who took part in that discussion, and whose opposition led to the laying of this proposed amendment indefinitely upon the table, which put the convention on record as refusing to insert a comma after the words

"local self-government." I refer to Mr. Winn of Defiance, whom I have known for thirty years. Had it not been for this discussion, it seems there could be no doubt that the limitations referred to the things enumerated in the section both by the phrasing of the section, and by the well-known rule of construction that where one seeks to enumerate certain powers or things coming under a restriction, the restriction applies only to those enumerated. In other words, a construction has been put upon that sort of phraseology, in contracts and other matters, by courts universally, that when one undertakes to enumerate certain things, only those things come under the restriction there enumerated. So I say, both the phraseology of this section and this well-known rule of construction would lead one to conclude that the section should be constructed as though there were a period after the words "self-government"; and that, so far as things affecting local self-government are concerned, the municipality had full power and control over such matters; and because the police power, sanitary and other similar regulations like the police power and sanitary power, or, in other words, the police and health departments, are necessarily under the state laws, for the reason that they are more far-reaching than the boundaries of a municipality, and they affect the entire body politic of the state, and even farther than the state; so that, whatever regulation cities have over the police and sanitary departments, they are necessarily subordinate to the general laws of the state, and must not in any way conflict with them. If they do, they are invalid.

Now, when the home rule amendment was adopted by the people of the state in adopting these amendments to the Constitution, they must have meant something; and if local self-government could only be exercised when it did not conflict with the general laws of the state all the energy of the home-rulers was wasted and the people themselves were deceived. I know it is argued that this gave a municipality the right to act in absence of such action upon the part of the state Legislature; but the Legislature, if it was in session, or at the next session, could

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nullify by a general law any provision of a charter; and if the Legislature felt opposed to a certain city and its charter provisions, every one of them might be nullified by a general law upon that subject which was different from the one provided for by the charter. And so I say that the action of the convention upon this question was futile, and the people deceived when they voted for and expected to get home rule in municipal affairs, if municipalities can only exercise the powers granted by charter subject to the approval of the Legislature, or can only exercise such powers when not in conflict with existing laws of the state.

The question of government of our cities in the state of Ohio is older than most of us that are practicing law today, and the manner of evasion of the general law had become a scandal in Ohio; and it was proper and usual for every state Legislature to rip up the governments of the cities because those in power in a particular city were out of harmony or not in good standing with the dominant party in the state Legislature. The people of Ohio had become tired of having their local self-government upset by the great mass of legislators over the state, who neither understood their conditions and institutions nor knew the problems that they had to work out; and so when the convention met in 1912 they sought to provide by general law for the incorporation of cities and villages and to have them classified as such; and then they sought further to take the conduct of municipal affairs out of the power of the Legislature and to put it in the hands of themselves who knew the needs of the community best, to-wit, the people of the city, and thus sought to provide for local self-government that would be beyond the reach of each successive Legislature; and therefore they fixed the power in the Constitution itself; and so the only question whether or not a municipality that has adopted a charter is acting beyond the scope of its authority must be measured by the Constitution itself. So if an act provided for by the charter does not exceed the powers of the municipality which are given it by the Constitution itself, such power must be upheld. If this is not

true, then the people of Ohio might be said to have been buncoed into voting for something that was different from what they anticipated.

Now, it is argued that this is a delegation of sovereignty: that the state has no right or power to delegate its sovereignty; that there can not be a sovereignty within a sovereignty. Of course that statement begs the question, for it is not true that a sovereignty can not be created in a sovereignty. The United States is sovereign; every one of the states is sovereign; but a different kind of sovereignty. The state of Ohio is no less a sovereign because a paramount sovereign, the United States, has jurisdiction and powers within the borders of Ohio. Indeed, our form of government has been the admiration of statesmen and students of government in all lands, because of the smooth way in which divided sovereignty might exist side by side without breaking down the sovereignty of either. So I say that it is not true that sovereignty can not be delegated; and it does not lessen the sovereignty of the state of Ohio because it has seen fit to delegate certain rights of sovereignty to a city which has adopted a charter, the city of Cleveland if you please. It does not lessen the sovereignty of Ohio for the reason that all sovereignty lies in the people, and the people can, by amendment to their Constitution in a way provided for by the Constitution itself, reclaim that sovereignty any time they see fit; but so long as that has not been reclaimed, the city would have the right to exercise the sovereignty granted it by the Constitution, and the legislative acts would be absolutely futile, because the Legislature is a creature of the Constitution; and the city, under a charter adopted in accordance with its provisions, is likewise a creature of the Constitution; and the city, acting under its charter, has the same rights and powers within the sovereignty granted that the Legislature has. Somebody has said that the power of amendment in a Constitution is the power to change the form of government without a revolution; and no one who is familiar at all with our idea of government can for a moment dispute the proposition that the people of the United States, by follow-

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ing the course marked out in the Constitution, to-wit, by amendment, could change a republic to an absolute or limited monarchy if we saw fit, and that could be done peacefully without a revolution. So could the people of Ohio do the same thing, if it were not for the limitations placed upon the state by the Constitution of the United States, which provides that the state government must always be a republic in form. If it were not for that provision in the Constitution of the United States, the people of Ohio could, by the power of amendment, absolutely change their form of government into that of a limited or absolute monarchy. So it is futile for one to say that a state can not grant sovereignty to a political subdivision within its borders. It is futile to say that the state of Ohio has lost its sovereignty because it has granted sovereignty to a political subdivision of the state, because at any time the sovereign power, the people, can withdraw from that political subdivision that sovereignty and take it unto itself. But the sovereign power is the only one that can do that, and that is the people of the state, and the Legislature is only a servant of the people, the true sovereign.

So now it must follow that a state may grant sovereignty to a city under our present Constitution. And when a city has, in accordance with the provisions of that Constitution, to-wit, Section 7, adopted a charter a new law-making power is created within the state, and the city council of the city of Cleveland has the same power to legislate, within the provisions of the charter and the Constitution of the state, as the Legislature itself has to exercise its powers. Such legislation of the city council must necessarily supersede that of the state Legislature; otherwise the whole home rule proposition is of no force or effect whatsoever.

So now the question comes as to whether the granting of a street railway franchise by the city is a matter of local concern. If it were not for the high standing of counsel for the plaintiff at this bar, and his reputation for learning as a lawyer, one would think that he had become confused between the different

kinds of franchises, for much stress was put upon the question as to the power of a city to grant a franchise, and my attention has been called to perhaps a score of cases where the definitions have been referred to. This is one: 27 N. Y. Reports. The definition of a franchise by Bouvier is, "A privilege conferred by grant from the government and bestowed on individuals." I call attention to this one because it is a sample of many to which I have been referred, and then an argument based upon that, that the right to grant a franchise was a state function, and that a municipality could not, under any circumstances, grant a franchise.

Now, the franchise that Bouvier was defining, and the franchise that the cases cited referred to, are purely subjects of state grant or creation. In other words, the word franchise is used in a dual capacity. First, we mean a right for a corporation to exist. Now, that must come from the state, because in many instances it carries with it the right of a limited eminent domain. It is a grant of a part of the state sovereignty, if you please, in a limited extent. And one readily concedes that the city of Cleveland, even under its charter, could not create a corporation. It has not been granted such power by the Constitution. The creation of a corporation is a state matter; and a franchise, used in that sense, can only come from the state; and I quite agree with counsel that such a franchise could not be granted by the city of Cleveland, either before or after the adoption of the home rule amendment. But now, the other sense in which we use the word franchise—we use it in the sense of a contract. It will not be contended for a moment that the Cleveland Railway Company has not the power to make a contract. It is a corporation. It is given the right to make contracts. It would be called a contract if it was made between the Cleveland Railway Company and a citizen or an individual. Now, because the city of Cleveland is a sovereign within the limited field marked out by the Constitution, hasn't it the power to make a contract? If it makes a contract with the street railway company, by ordinance which would be accepted by the railway

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company, to lay railway tracks upon a particular street, that would be called a franchise. Now, there is just as much difference between that sort of a franchise and the franchise to which I have already alluded, and which has been argued before me at great length, as there is between night and day. There is no similarity between them whatever—nothing similar except the names. So all the argument with respect to franchises in that respect comes to naught. And in Section 4 of the Constitution it is provided:

“Any municipality may acquire, construct, own, lease and operate, within or without its corporate limits, any public utility and product the service of which is or is to be subject to the municipality or its inhabitants and may contract with others for any such product or service.” * * *

Now, the Constitution itself gives the municipality the power to contract; and when a contract is entered into between the city of Cleveland and the street railway company, it is nothing but a contract, though we may call it a franchise. Indeed no other power could make a contract to lay upon the streets of Cleveland a railway track except the city of Cleveland itself. So it seems perfectly clear that Cleveland was granted the power of local self-government.

Now, are the streets a matter of local self-government? The General Code of Ohio makes the city the custodian of the streets, makes the city liable in damages for any injury that results to any person by reason of the fact that the streets are not kept free and open and clear from nuisance. There was no common law liability upon the city, but it is a creature of statute. Yet the city of Cleveland has control over its streets with the right of every person to use those streets to travel upon. Now, has it the right over the streets to such an extent that it can, by a provision of the charter, build a street railway upon the streets without the consent of the abutting property owners?

Section 187 of the charter reads as follows:

“No consent of the owner of property abutting on any highway or public ground shall be required for the construction,

extension, maintenance, or operation of any public utility by original grant or renewal, unless such public utility is of such a character that its construction or operation is an additional burden upon the rights of the property owners in such highways or public grounds."

Section 3770 of the General Code provides:

"No such grant shall be made, except to the corporation, individual or individuals, that agree to carry passengers upon such proposed railroad at the lowest rates of fare, and shall have previously obtained the written consent of a majority of the property holders upon each street or part thereof, on the line of the proposed street railroad, represented by the feet front of the property abutting on the several streets along which such road is proposed to be constructed." * * *

The evident purpose of Section 187 of the charter was to abrogate so much of Section 3770 of the General Code as relates to the written consent of property owners. Now, the power of the city and its charter to take away the right of the property owners provided for in the section of the General Code to which I have referred, depends upon the question as to whether or not the owner has a property right in the consents or whether it invades his property right. It was admitted frankly by counsel in argument that the Legislature would have undoubted right to repeal, or modify, or change this provision at its will. That admission concedes that there has been no property right granted to the abutting owner. It is only a privilege that could be taken from him. If we go back a few years and recall to our minds what was almost a scandal in the clamor for consents, and the purchasing of consents, and parties selling consents to one railroad company and then selling them at a higher rate to another railroad company, we can see one reason why the charter provision was adopted by the people of this city. Why, it was no uncommon thing for men to go upon the streets with large bankrolls and buy consents from individuals. Now, this was not a property right; it was only a privilege that was conferred upon the owners of the abutting property on the streets

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of the proposed railroad route. It may have been a wise provision. It may be now a wise provision as a general law of the state because companies might seek to put railroad tracks upon a street where they should not, and where there is no demand for it to be, but in this case the railroad company is not seeking for any grant. It is the city that is seeking to compel them under the powers granted the city in the Taylor franchise or grant to compel the railway company to put tracks in a particular street or streets. And so it has been universally held that this right to consent was not a property right, and therefore a vested right of individuals has not been invaded, and therefore if the building of a street railroad be of local concern, why hasn't the city of Cleveland the right to provide in its charter that consents should not be necessary before a street railroad could be laid. I can conceive of nothing more local in its character than a street railroad system which gets its power from the city, which occupies the streets of the city, particularly in Cleveland where the whole management and control of the street railroad is ultimately in the city council by the Taylor grant itself, and a commissioner who is appointed by the mayor with the consent of the council. The provision of the charter provides that consents shall not be necessary unless it impose an added burden upon the property.

In the case of *Traction Co. v. Parish*, 67 O. S., 181, Judge Burket of our Supreme Court, at page 191, says:

"While the abutting lot owner has this right of public travel on the street, and the right of ingress and egress from the street to his lots, the public authorities retain the right to improve the street, and place such means of travel thereon as in their judgment shall best conserve the public welfare. And so long as his easement of ingress and egress is not materially injured, he is without remedy, because he is not wronged, said easement—all the property right he has in the street—not being interfered with."

And again in the case of *Street Railway v. Cumminsville*, 14 O. S., 523, Ranney, J., at pages 545-6 says:

"The use of such a highway for the purposes of a street railroad involves the application of new appliances and modes of travel, rather than of any new principle. * * * So far as carrying of passengers by this mode is concerned, it differs in nothing from the exercise of the common right of carrying them by coaches or omnibuses. * * * When this grant is confined to a mere occupation of the easement, previously acquired by the public, although its enjoyment may require a restriction upon former modes, we can see nothing in it but the control, regulation and adjustment of a public right, so as to make it best answer the purposes, and meet the wants of all classes of the community."

So it would seem from these authorities that the street railroad, however obnoxious it might be to some people, and the running of cars over said railroad, is not an added burden for which the abutting property would be entitled to compensation, nor is it necessary to appropriate. In other words, it is simply an added use for which the highway is laid out, kept up and maintained, to-wit, for the use of the traveling public. So, there is nothing added by way of burden, and as it is a local matter it seems to me that the Constitution of the state of Ohio as amended in 1912 gives the city the right, and it has adopted a charter to manage and control its own local affairs without let or hindrance from the Legislature, and the charter provision in effect operates as a repeal of the provision of the statute so far as it relates to the grant of consents in the city of Cleveland, which has adopted a charter.

Now, it is argued that this is a violation of the principle of the uniformity of the laws throughout the state relating to municipal corporations. Fortunately we are not left to guess as to what the rights are in this respect.

In the case of *State, ex rel City of Toledo, v. Lynch*, 88 O. S., 71, a decision is rendered by Judge Shauck, one of our ablest judges, and who is not at all in accord or in sympathy with the modern idea of local self-government. Speaking of the application of the uniform doctrine throughout the state, he points out in that case, and indeed the syllabus is as follows:

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“The provisions of the Eighteenth Article of the Constitution as amended in September, 1912, continue in force the general laws for the government of cities and villages until the 15th day of November following, and thereafter until changed in one of the three modes following: (1) By the enactment of general laws for their amendment; (2) by additional laws to be ratified by the electors of the municipality to be affected thereby; (3) by the adoption of a charter by the electors of a municipality in the mode pointed out in the article.”

Now, you will notice that the Supreme Court pointed out that the uniformity of laws might be interfered with by the adoption of a charter by the electors of the municipality, if carried out as provided for in the Constitution. This case of *Toledo v. Lynch* was the first case that went to the Supreme Court, having to define the power of local self-government in the cities. Toledo attempted to establish a municipal moving picture theater, an enterprise not authorized by state laws. The Supreme Court decided that the adoption of a charter was a necessary prerequisite to the exercise of a power not theretofore granted by the Legislature; that is, cities have acceded by that home rule amendment to all the powers of local self-government that had been granted prior to that time, but if they wanted to add new powers, they must adopt a charter for that purpose. Whether or not Toledo, by adopting the charter, would have the right to go into the moving picture business is a matter aside from the present discussion, and indeed was not decided, and could not be decided while that case was before the Supreme Court, but they decided that they could not do it until, at least, a charter had been adopted by the city of Toledo; but the point I want to make is that it pointed out a way in which the uniformity of state government could be interfered with, to-wit, by the adoption of a charter, which provided other and different powers; and so now, within the limits of local self-government provided for by the charter itself, authorized by the Constitution itself, the city of Cleveland has just as much power and right to legislate as the Legislature has for the rest of the state, and the state Legislature can only interfere on such

matters as are of state-wide concern like the health and police power of the state.

We are not left to conjecture on this proposition either. In the Fitzgerald case that went up from this city, was tested the powers of the people to adopt a charter providing for preferential voting. Now, if anything can be of state-wide importance it is the privilege of voting and the election machinery. One would think that that must necessarily be of uniformity throughout the state. The Constitution itself even provides the method of voting, in a measure, and yet the Supreme Court of this state held that the charter provision as to preferential voting was not in conflict with the Constitution, and upheld the charter in that respect. Judge Donahue dissents from that decision, but not on the ground of its contravening any act of the Legislature, but he contends that it contravened another amendment to the Constitution which was adopted at the same time, adhering to the doctrine laid down in that case, that so far as the legislative acts are concerned, the charter in that respect prevailed.

Now, that is going farther than is necessary to go in this case.

Again, the Supreme Court rendered a decision in the case of *State, ex rel Lentz et al, Civil Service Commission, v. Edwards et al*, which will be reported in 90 O. S. The case went up from the city of Dayton and is known as the Dayton case. The city of Dayton adopted a charter and provided for a manager as the head of its government, and the charter provided for the appointment of a civil service commissioner, which was different from that provided for by the Legislature. In that case, Chief Justice Nichols, rendering the opinion, cites *Toledo v. Lynch*, 88 O. S., 71, and *Fitzgerald v. City of Cleveland*, 88 O. S., 338, the first to show how the constitutional provision for the uniform government of cities and villages could be changed, to which I have already called your attention, and the second to show that the charter, when adopted by a city, had the right to define the powers and duties of the different departments, pro-

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vided they did not exceed the powers granted in that article nor disregard the limitations of *other provisions of the Constitution*. You will notice that it excludes from this all acts of the Legislature, but only includes the charter and laws made in conformity therewith, and made in conformity with the articles of the amendment of the Constitution providing for home rule and limitations imposed by other provisions of the Constitution. The Supreme Court goes on in this Dayton case to say:

“The manner of regulating a civil service of a city is peculiarly a matter of municipal concern. One of the powers of local self-government is the power of legislating with reference to the local government within the limitations of the constitutional provisions above referred to. As long as the provisions made in the charter of any municipality with reference to its civil service comply with the requirement of Section 10, Article XV, and do not conflict with any other provision of the Constitution, they are valid, and under the cases referred to, discontinue the general law on the subject as to that municipality. That provisions adopted by a city might differ from the general laws within the limits defined, was not only expected but the very purpose of the amendment was to permit such differences and make them effective.”

Now, the court in this case absolutely decided the question at bar because surely the civil service is of as state-wide importance as the building of a street railroad within the streets of a municipality, and surely if the state law upon the civil service was abrogated by the adoption of the Dayton charter, so long as it did not conflict with other provisions of the Constitution, the state law relating to the consents of property owners or abutting owners on the streets where a railroad is to be built must be abrogated by Section 187 of the charter, and there can be no question from these authorities that the state law relating to the giving of consent of abutting property owners is in effect repealed, so far as the city of Cleveland is concerned, and it was perfectly within the power of the people of Cleveland in the adoption of their charter to so abrogate the statute, and why shouldn't it be so? Who else is interested in the

building up of the means of travel in the city except the people of the city themselves? Is it possible, under the home rule amendment, that the Legislature could be antagonistic and could interfere with the domestic concerns of a city, and repeal the provisions of our charter, by passing state laws upon the subject that the people have already legislated upon by their charter? If it were so, then the home rule amendment would mean nothing whatever.

My attention has been called to the construction that is placed upon similar charters in states where home rule has been allowed. In almost every instance those cases have gone at great length, some going so far that one could hardly go with them. I will not stop to cite the authorities, but they seem to be numerous and all under the same line. Of course, it is argued that the same words that were in the California home rule amendment, for example, were not adopted in the amendment to our Constitution. The debates of the constitutional convention showed bitter antagonism upon these various questions that were discussed, and the opponents of home rule apparently thought that they had succeeded in pulling the teeth out of the home rule proposition. The *ultra*-advocates of home rule wanted to have inserted in the home rule proposition as an *addenda* or an addition to Section 3 as it now stands the following:

“But such regulation shall be subject to the general laws of state except in municipal affairs.”

This was in effect the California amendment, but a compromise was agreed upon in adopting Section 3:

“Municipalities have authority to exercise all powers of local self-government, and to adopt and enforce, within their limits, such local police, sanitary and other regulations as are not in conflict with general laws.”

And Section 7:

“Any municipality may form, or adopt, or amend the charter of its government, and may, subject to the provisions of Sec-

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tion 3 of this article, exercise under it all the powers of local self-government."

Now, it was argued by the opponents, and thought by the opponents of local self-government that if the qualifying phrase of Section 3, "as are not in conflict with general laws," applied to all activities of the municipalities, then Section 7 would also be a limitation upon such charters as municipalities might provide, so that all local legislation would be subject to the general laws of the state, or, if true, of course, would have been defeating the very end of home rule as I have already pointed out.

I think, and I can't help but think, that the first phrase ending with "local self-government" granted complete and absolute power to the people of the municipality to provide by charter for all matters purely of local self-government, and then the rest of the phrase simply gave them added powers over local police, sanitary and other similar regulations, and then, recognizing that those enumerated powers were a matter of state-wide control, they put the modifying or limiting phrase on, "as are not in conflict with general laws," and, of course, if that were so, the adoption of Section 7, subject to the provisions of Section 3 of implied limitation thus contained in Section 7, would be limited to the limitation contained in Section 3, and this seems to have been the construction placed upon it by our Supreme Court in the cases decided by them on this charter, and so I am constrained to come to the conclusion that the provisions of the charter, with respect to the granting of consents, prevail, and not those of the state, and therefore the demurrer will be overruled, and judgment entered accordingly.

**PASSENGER THROWN FROM CAR STEP BY SUDDEN
STARTING OF CAR.**

Common Pleas Court of Hamilton County.

OWEN W. GRUBBS v. THE CINCINNATI, LAWRENCEBURG & AURORA
STREET RAILWAY COMPANY.*

Decided, April 4, 1914.

Negligence—Passenger Preparing to Step from Car—Thrown by Sudden Starting of Car—Misconduct in Argument to Jury—Proper Test as to, Considers the Manner of the Speaker as Well as the Words Spoken—Charge of Court.

1. Statements by counsel in his argument to the jury, which when placed in cold type may be susceptible of a veiled or insidious meaning, will not be so regarded by the court and treated as misconduct, where at the time they were uttered there was nothing in the manner of the speaker to indicate that they were meant to be harsh or offensive, but the impression produced was rather that they were spoken in a facetious mood.
2. Where a charge is not prejudicial and covers fairly all the points raised by the pleadings and evidence, a new trial will not be granted because in the opinion of counsel the verbiage might have been improved.
3. A passenger on an interurban car, which is approaching a regular stop at which the passenger intends to alight, and the name of the station is called by the conductor, has a right to assume when the car has been brought almost to a standstill that it will be brought to a full stop and he can take his stand on the step with safety, and when in so doing he is thrown from the car and injured by it being suddenly started, the proximate cause of the accident is the negligence of the motorman in giving the car the sudden jerk forward, rather than of the passenger in taking his stand on the car step.

Stanley Shaffer, for the motion.

George B. Goodhart, C. B. Matthews and James B. Swing,
contra.

*Affirmed by Court of Appeals without opinion. Motion by the defendant to dismiss the petition in error allowed by the Supreme Court, May 4, 1915.

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NIPPERT, J.

This is the third time that this action has been presented to the jury.

Upon the first trial the plaintiff recovered judgment against the defendant company in the sum of \$3,500, which, however, was reversed by the circuit court by reason of the fact that the plaintiff failed to sustain the allegations of his petition by a preponderance of the evidence.

Upon the second trial, the testimony given by plaintiff explained the alleged acts of contributory negligence charged against him by the defendant company, but the trial court, in the second trial, evidently did not deem the explanation sufficient to warrant the case to go to the jury and directed a verdict in favor of the defendant. The court of appeals, upon an examination of the record, found that the case should have been submitted to the jury on the ground that the plaintiff's testimony explaining his getting off of the car qualified the testimony given at the former trial in such a manner that it was error for the court below to take it from the jury, and the court of appeals sent it back for the third trial, which resulted in a verdict of \$6,000 against the defendant company.

The plaintiff was not present at the third trial, but his testimony given at the second trial was read *verbatim* into the record. So that, following the ruling of the court of appeals, it would have been error to have taken the case from the jury at the conclusion of plaintiff's testimony, as requested by the defendant company.

Both parties to this action have submitted exhaustive and carefully prepared briefs on the various phases of the case as presented to the court, and the court has given careful thought and research to the various matters submitted by counsel.

The defendant company places its contention for a new trial upon three grounds, to-wit:

1. That the verdict is against the weight of the testimony and is not sustained by sufficient evidence.
2. That there was error in the charge of the court.

3. That there was misconduct of counsel in the argument of the case prejudicial to the defendant.

I will take up the charge of misconduct of counsel first, for I believe if there is any place where the ethics of the profession should be observed in the minutest detail and where counsel on either side is entitled to that respect and courtesy which the high calling and learning of the profession demands, it is in the forum of our courts of justice. How can the bar expect to merit the honor and respect of the jury and the court if, in their relationship as officers of the court and members of a great profession, they are derelict in the duty which they owe to the courts by attempting to inject into a case, either by incompetent questions or invidious argument, uncalled-for statements reflecting upon the integrity or honesty of purpose of opposing counsel; and this court would not hesitate to reprimand any one who deliberately would be guilty of such conduct. In fact, if the court had in this instance, which is now relied upon by defendant's counsel as sufficient cause for a new trial, received the same impression that the complainant evidently received, or if the court thought that the jury had thus absorbed a biased and prejudiced view of counsel and his client, the court would then and there have withdrawn a juror and continued the case; but, knowing both counsel and being fully acquainted with their high character as gentlemen and lawyers, who, even in the heat of battle, are mindful of the duty which they owe to the court and their profession, the court can scarcely bring itself to view the alleged misconduct in the same light and with the same seriousness as the complainant.

The court remembers distinctly the statements made by plaintiff's counsel to which the defendant took exceptions, but is not inclined to give it the weight attributed to it by the defendant, and the court can not agree with the defendant that by reason of plaintiff's counsel's remarks to the jury in his opening argument, the minds of the jury were unduly prejudiced or influenced in favor of the plaintiff and against the defendant. It might have been better and would have been better and wiser if

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the statements had not been made, and in cold type they may bear the imprints of veiled and insidious reflections upon defendant's counsel, but the *manner* in which these words were spoken was not offensive nor harsh, but gave the court the impression of being more facetious than offensive, and further, as the court instructed the jury to disregard what was said by plaintiff's counsel and cautioned plaintiff's counsel to confine his remarks to the record, it does not appear to the court that sufficient injury, if any, has been done to defendant's cause to warrant the granting of a new trial on that point.

The second ground upon which defendant seeks a new trial is that the court committed error in its charge to the jury, in this particular, to-wit: that the court presented an issue not raised by the pleadings or the evidence in the case by referring to the act of the plaintiff in leaving the car when the car had come to a full stop, and that while plaintiff was about to step off of the car, the car, without warning, started forward, causing plaintiff to be thrown to the ground.

There was some variance in the testimony as to whether or not the car had come to a full stop, or whether the car had merely slowed up for the Big Four crossing at that point. Some witnesses testified that the car had come to a full stop when the plaintiff was on the platform ready to leave the car, and there was also testimony to the effect that the car was moving so slowly when the doctor reached the last step on the platform that it was impossible to tell whether or not the car was still moving or had come to a full stop, and there was testimony that the car was moving three to four miles an hour when plaintiff alighted. This was a question of fact to be submitted to the jury, and it was submitted to the jury in the court's charge in as explicit language as the court was able to put it. It must be realized that the testimony was contradictory and presented a proposition somewhat complicated and which could not be covered by the court in a single paragraph of the charge. The charge must be taken as a whole, and if the issues are fairly presented by the court to the jury in the court's instructions, the

verdict should not be set aside by reason of the fact that in the opinion of either counsel the verbiage of the charge might be changed or improved upon to comply with their ideas or convictions, if the charge is not prejudicial and covers fairly all of the points raised by the pleadings and the evidence.

The court feels that in its instructions to the jury it fairly and fully covered the various points raised by both plaintiff and defendant and put into the general charge the substance of some of the special charges requested by the defendant.

The failure of the court to grant the special charge requested by the defendant, with reference to getting off of a moving car, can hardly be considered prejudicial error as the substance of this special charge was embodied in the general charge and covered fully the point in question, and defendant did not insist upon the special instruction being given to the jury.

Coming now to the third ground upon which defendant asks a new trial, *i. e.*, that the verdict is against the weight of the evidence, the testimony shows that on the evening of the 29th day of April, 1905, the plaintiff, Dr. Grubbs, was a passenger on the traction car operated by the defendant company on its Lawrenceburg extension, having boarded the car at Lawrenceburg, Indiana, and paid his fare to Valley Junction, to which place the company sold tickets or collected fares, and which was a regular stopping place for passengers who desired to change cars to the Harrison branch of the same company, and where the cars of the traction company always came to a stop for the purpose of giving the conductor an opportunity of going ahead to see whether the Big Four steam railroad tracks, which crossed defendant company's tracks at that point, were clear and safe for passage. As the car slowed up for the Valley Junction stop the plaintiff left his seat in the rear of the car and went out to the back platform. He got on the lower step on the north side of the platform, preparatory to stepping off, when the speed of the car was suddenly increased and he fell, sustaining the injuries complained of, and for which the jury gave him damages in the sum of \$6,000.

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Plaintiff's testimony leaves it uncertain whether the car had come to an absolute dead stop, or whether it still had a barely perceptible motion. This difference is unsubstantial for the negligence charged by plaintiff against the defendant company was the sudden *starting* of the car to an increased speed while he was in the act of getting off.

While there are a great many cases which hold that the act of a passenger in voluntarily leaving a car while it is in motion constitutes contributory negligence, yet the better doctrine and that sustained by the greater weight of authority is that such conduct on part of the passenger is not negligence *per se*.

There may be exceptional circumstances attending the attempt of a passenger thus to alight, such as the great speed of the car, the age or infirmity of the passenger, combined with the darkness of the night, or other facts which render the attempt so obviously dangerous that the court may, where the testimony is undisputed, declare as a matter of law that the passenger's conduct was reckless and negligent, but ordinarily it is for the jury to say whether he acted as a reasonably cautious and prudent man would act under the same circumstances, and I am inclined to believe that this is one of the cases where it was proper for the jury to decide from all of the evidence whether or not plaintiff's conduct, under the particular circumstances in this case, warranted a recovery against the company.

In the case at bar, some of the material facts are disputed; in the first place, the position of the passenger at the time when the car started, and the speed of the car when plaintiff alighted, and different inferences may be reasonably drawn therefrom, and whether the plaintiff was guilty of such contributory negligence as to preclude a recovery is a question of fact exclusively within the province of the jury.

The court does not feel that it is negligence in law for a passenger to attempt to alight from a car moving so slowly that to alight therefrom would not appear dangerous to a man of ordinary prudence, and such a question of negligence should be

submitted to the jury, for it is not negligence under all circumstances and conditions to attempt to alight from a moving car.

Dr. Grubbs had paid his fare to the conductor as far as Valley Junction and he, as well as the conductor, testified that when the car was nearing the station at Valley Junction the conductor called out "Valley Junction, change cars for Harrison," and the car commenced to slow down in the usual manner for a stop. When the car reached the station at Valley Junction, plaintiff got up promptly and left the car. So, when the car slowed up on approaching the station at Valley Junction and on approaching the railroad crossing of the Big Four railroad, which is also located at that point, the plaintiff had a perfect right to assume that it was being slowed up for the purpose of enabling him to get off, and further to enable the conductor to run ahead to see if the Big Four railroad track was clear, and it was proper for him to assume that the car's speed would be gradually lessened until it had come to a *full stop* at the crossing, rather than be increased with a sudden jerk. He assumed, of course, the risk of the ordinary movement of a car slowing up at a junction point to let off a passenger, but not the risk of a sudden negligent movement at the very place where and moment when it should have stopped and where in view of the commonly known custom of passengers on this line those in charge of this car, in the exercise of that degree of care which the law enjoins upon public carriers, should have known of the position of the plaintiff.

I agree with the argument of counsel for the defendant that Dr. Grubbs placed himself where he was in danger of falling off and being injured as a result of a sudden start before he had gotten safely off, but that was a risk he could not have anticipated because he had a right to assume that the car would stop long enough to allow him to get off safely, and if it had so stopped, as it should have done, no accident could have happened. His position on the step of the car was that ordinarily assumed by one about to step from a car and whether he exercised ordinary diligence and care while in that position was a question for the

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jury. Some of the testimony showed that the speed of the car at the time was between three and four miles an hour, while other testimony showed that the car was going very slow, scarcely moving.

Let us examine the record on this point. The motorman of the defendant company, who was in charge of the car on the evening of the accident, testified positively that the car had come to a full stop for the purpose of allowing passengers to alight and in order that the conductor might go forward to the tracks of the steam railroad to flag the motorman to cross. The conductor testified that all cars bound towards Anderson's Ferry stop immediately before crossing the Big Four railroad at Valley Junction, and that this particular car on which Dr. Grubbs was a passenger came to a full stop before it proceeded across the tracks of the Big Four railroad at Valley Junction, and that prior to his getting off the rear end of the car to go forward to the railroad crossing and motion the motorman to come across he called "Valley Junction." The conductor further testified that before the car had come to a full stop he alighted to run ahead of the car. In reply to a question on the point of whether or not the conductor saw the plaintiff, the record shows the following on page 156:

"Q. State whether or not you saw him (Dr. Grubbs) in the act of alighting from the car upon which you were conductor at 7:18 o'clock in the afternoon of April 29, 1905. A. I did not see him.

"Q. State whether or not at that time and place you saw him arise from a seat in the car and do anything to indicate that he intended or desired to alight from that car at that time and place? A. I did not."

According to the testimony of both the motorman and the conductor the car had come to a full stop at a regular stopping place, and it was the conductor's duty not to start the car before passengers had a reasonable opportunity to get off safely, and his failure to do so would be negligence.

In view of the fact that the conductor left the car before the car had come to a stop, and in view of the fact that the plaintiff occupied the second seat from the rear platform, it might well be possible that between the time that the conductor had left the car and reached the crossing, the plaintiff, without being seen by the conductor, could have reached the steps of the car prior to his getting off.

If the car only slowed up and did not come to a full stop, as may be inferred from the testimony of Dr. Grubbs and Mr. Longenecker, having reached a regular stopping place provided by the rules of the company as well as by the law of the state, it was not negligence for passengers who had bought their transportation to that point from the conductor in charge of the car to get onto the steps in anticipation that the car was slowing up for the purpose of making the usual stop, and if they got off before the car had fully stopped and were hurt by a sudden increased speed of the car due to the signal of the conductor to the motor-man, then it was a matter for the jury to decide whether, under such circumstances showing some negligence on part of the passenger, the proximate cause of the injury was the sudden speeding up of the car and the failure of the conductor to see and ascertain that none of his passengers were in the act of alighting.

The jury having found by its verdict that the plaintiff was in the exercise of ordinary care and that the company was negligent in the manner alleged by the plaintiff, the court does not feel justified to hold that, under such circumstances and in face of the evidence, conflicting though it may be, the verdict is not sustained by sufficient evidence. This is the third trial of this cause since the happening of the accident, April 29, 1905, and the size of the verdict and the peculiar circumstances surrounding the accident warranted the court in examining diligently every page of the record, reading carefully the excellent briefs of counsel and searching the numerous authorities submitted on both sides, in addition to many other citations referring to cases of similar nature, and the court, after mature deliberation, has

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reached the conclusion that defendant's motion for a new trial should be overruled.

Authorities examined in addition to those cited by counsel: Booth on Street Railways, par. — ; 140 Wis., 455; 64 S. E., 536; 12 C.C.(N.S.), 327; 31 Ky. L. R., 480; 127 N. W., 330; 111 Mo. App., 653; 67 Ohio State, 153; 137 Mich., 392; 110 N. Y. Supp., 125; 30 Ind. App., 193; 136 Mich., 142; 120 Ala., 152; 102 Mo. App., 277; 125 Mo. App., 710; 147 Ala., 702; 116 Mo. App., 37; 147 U. S., 572.

**LIABILITY OF BANKS FOR PROCEEDS OF COLLECTIONS
MADE BY CORRESPONDENTS.**

Common Pleas Court of Montgomery County.

**THE PLATT IRON WORKS COMPANY v. THE THIRD NATIONAL
BANK.***

Decided, December 19, 1913.

Banks and Banking—Draft Deposited for Collection—Forwarded to Correspondent Bank, Which Made the Collection But Failed to Remit Proceeds—No Liability on the Part of the Forwarding Bank, When—Custom and Usage.

While it is the settled law of Ohio that a correspondent bank in receiving a draft for collection becomes the agent of the bank forwarding the draft, yet the law will presume in the absence of any showing to the contrary that it was understood by the principal the collection would be made in accordance with the custom and usage of banks with respect to such collections, and in case of failure of the correspondent bank to remit the proceeds no liability arises in favor of the principal as against the forwarding bank, where no claim of negligence on the part of the forwarding bank is made.

*Affirmed by the Court of Appeals without opinion.

McMahon & McMahon, for plaintiff.

Gotschall & Turner, contra.

SNEDIKER, J.

This case is before the court on demurrer to the petition. The cause of action stated is that the trustees in bankruptcy of the plaintiff company on December 11th, 1911, deposited with the defendant for collection a check for \$299.50 drawn to their order by the Shaw Cotton Oil Company on the Bank of Shaw, of Shaw, Mississippi; that defendant forwarded said check through its various agents for collection, and same was presented for payment by the First State Bank of Shaw to the said Bank of Shaw which paid the First State Bank of Shaw. Thereupon, the First State Bank of Shaw remitted by draft upon the Bank of Commerce & Trust Company, of Memphis, Tennessee. But when the draft was presented to the last named bank payment was refused because the First State Bank of Shaw was closed and in the hands of a receiver. No negligence on the part of the defendant, the Third National Bank, is alleged. The claim of the plaintiff, therefore, rests upon rights which it contends arise from the fact that the draft which was forwarded by the agent of the defendant was refused payment. That the First State Bank of Shaw is the agent of the Third National Bank and not the agent of the plaintiff company is clearly decided by the Supreme Court of the State of Ohio in the case of *Reeves, Stephens & Co. v. State Bank of Ohio*, 8th O. S., 466. The first syllabus of this case, which recites the law as laid down by the court is to the effect that the correspondent of a bank, which receives a collection of the character referred to in the plaintiff's petition, is the agent of the bank and not the sub-agent of the owner of the instrument left for collection; and that payment to the agent is payment to the bank, unless there was some agreement or authority between the owner and the bank beyond the mere fact of the instrument being received for collection.

Does this relationship existing between the Third National Bank and the First State Bank of Shaw of itself give rise to a

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liability of the defendant to plaintiff which entitles plaintiff to recover under the conditions here stated? There is (as the court is entitled to and should recognize) existing a custom or usage in the banking business conforming to the exact procedure adopted in the collection of this check by the Third National Bank. When the check in question was deposited with the Third National Bank by the plaintiff, such custom or usage must have been in contemplation by the respective parties to this case. It was both the right and the duty of the Third National Bank to follow such custom in making this collection and procuring its return. Its right and duty arose from the fact that such custom or usage became a part of the contract which the bank entered into with the plaintiff for the purposes of the collection. Defendant's authority was governed by such usage and its agency could only be properly executed in conformity therewith. The adoption of any other plan would have been at the defendant's own risk.

“Besides the express and incidental powers, established custom or usage oftentimes, to a great extent, adds other powers to the agents express authority. When a principal appoints an agent for a certain purpose in respect to which there are certain well established customs or usages, the law will presume in the absence of any circumstances showing the contrary that the principal had such usages in view when he appointed the agent, and if the latter transacts the business according to such customs or usages the principal will be bound thereby.” *Clark & Skyles on Agency*, Vol. 1, page 502.

In following out this custom, the defendant bank finds itself in possession of a draft which, not through its own fault but by the vicissitudes of business, is rendered uncollectible. Is the loss incident to this condition of affairs the loss of plaintiff or defendant? In the absence of any averment of negligence on the part of defendant, how can plaintiff complain? Having done all that it could do or ought to have done as the agent of this plaintiff, defendant has met all the requirements of its contract for collection.

“Where an agent is employed to transact business in respect to which there exists certain established customs or usages, in the absence of anything to the contrary, such customs or usages will enter into and form an element of the agent’s authority. In such cases then it is the agent’s duty to act according to such customs or usages, unless he has received positive instructions to the contrary, or unless there are other circumstances in the case showing that such customs or usages were not to form part of his authority, and in the absence of such instructions or circumstances, if he acts according to such customs or usages, he will not be liable to his principal for any loss that may result.” *Clark & Skyles on Agency*, Vol. 1, page 885.

In our opinion, defendant is not liable to the plaintiff for the amount of the check so deposited with it, and the demurrer to the petition is therefore sustained.

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AS TO ADDITIONAL ALLOWANCE FOR CLERK HIRE.

Common Pleas Court of Henry County.

**IN RE APPLICATION OF O. A. DIEMER FOR AN ADDITIONAL
ALLOWANCE FOR CLERK HIRE.**

Decided, June 21, 1915.

*Compensation for Deputies, Clerks and Assistants in County Offices—
Authority of the County Commissioners with Reference Thereto—
What Would Justify an Additional Allowance by a Judge of the
Court of Common Pleas—Construction of the Salary Act.*

1. The salary act, providing compensation for county officials and their deputies, clerks and assistants, etc., confers upon the board of county commissioners of each county in the state of Ohio broad discretionary and administrative or governing duties and powers.
2. The duties and powers so conferred authorize and require such board of county commissioners acting under Sections 2980, 2980-1 and 2981 of the General Code, to allow or disallow, regulate and limit the employment of deputies, clerks and assistants, etc., and the expenditure of the public funds therefor to the actual requirements of the public service.
3. The duties and powers so conferred upon the board of county commissioners are not arbitrary, and they must be used by such board of county commissioners with legal and not arbitrary discretion.
4. The power conferred upon a judge of the court of common pleas to make additional allowances, etc., by Section 2980-1 of the salary act, is essentially judicial and must be exercised in a judicial capacity.
5. To justify the court or such judge in ordering an additional allowance under Section 2980-1, it should reasonably and clearly appear that a necessity for the good of the public service exists, and that the board of county commissioners are without authority to meet such exigency, or that such necessity exists and that the board of county commissioners have abused their authority in the premises.

O. A. Diemer, in propria persona.

R. W. Cahill, Prosecuting Attorney, contra.

PRENTISS, J.

This proceeding grows out of an application filed by the clerk of this court asking for additional allowance for deputy hire in his office for the month of July, 1915.

It appears from the application that the additional allowance asked is for the purpose of meeting a deficiency arising on account of the clerk having raised the salary of his deputy in excess of the sum allowed by the commissioners and in excess of a subsequent additional sum allowed by a former judge of this court.

The county commissioners were present at the hearing, and in open court disapproved the application, and denied the necessity for any additional allowance, and insisted that the allowances already made were amply sufficient and that no additional allowance was necessary for the good of the public service.

It appears from the evidence submitted, that the fees earned in the office of the clerk of this court. for the fiscal year ending in November, 1914, were \$1,464.40; that the clerk prepared and filed with the county commissioners a detailed statement, as required by Section 2980 of the General Code, and that the county commissioners on the 25th of November, 1914, allowed the clerk of this court one deputy at a fixed salary of \$36.61 per month, and allowed an aggregate sum of \$439.32 therefor, designating the sum of \$256.27 of the aggregate sum so fixed to be expended by the present incumbent, and the balance to be expended by his successor elect. The additional allowance by the judge of this court is ordered to be expended for January, February, March, April, May, June and July, 1915--the two allowances providing a salary of \$50 per month.

It also appears that the fees earned by the clerk's office, during the present year to this date, amount to the sum of \$1,266.50.

Under these circumstances, is this court authorized to make an additional allowance under the provisions of Section 2980-1 of the General Code?

It is insisted by the applicant that the question of additional allowance, under the provisions of Section 2980-1, is entirely discretionary with the judge of the court of common pleas to whom the application is made, and that such judge may make the allowance at his pleasure. On the other hand, the commissioners contend that they act in an administrative or governing capacity, and are clothed with discretionary powers in reference

to the employment of deputies for the various county offices, and in regulating the compensation therefor.

The question involved requires a consideration and construction of the salary act of this state, and especially of Sections 2980, 2980-1 and 2981.

In 1906 the Legislature enacted a complete law upon the subject of salary for county officials and their deputies, which is found in 98 Ohio Laws at page 89. This act with the subsequent amendments is now comprised in Sections 2977 to 3004, inclusive, of the General Code.

This enactment furnishes a new method of compensation for all county officers and their assistants.

The policy of collecting fees from those demanding service is now as it was before, but all such fees collected are required to be certified into the county treasury.

The principal purpose of the salary act is to divert the excess fees over and above a fair compensation to the county officials and their assistants, if any, for services rendered, from the officers to the general fund of the county for the public welfare.

Section 2980 of the General Code provides:

“On the twentieth of each November such officer shall prepare and file with the county commissioners a detailed statement of the probable amount necessary to be expended for deputies, assistants, book-keepers, clerks and other employees, except court constables, of their respective offices, showing in detail the requirements of their offices for the year beginning January 1st next thereafter with the sworn statement of the amount expended by them for such assistants for the preceding year. Not later than five days after the filing of such statement, the county commissioners shall fix an aggregate sum to be expended for such period for the compensation of such deputies, assistants, book-keepers, clerks or other employees of such officer, except court constables, which sum shall be reasonable and proper, and shall enter such finding upon their journal.”

Section 2980-1 of the General Code provides:

“The aggregate sum so fixed by the county commissioners to be expended in any year for the compensation of such deputies, assistants, book-keepers, clerks or other employees, except court

constables, shall not exceed for any county auditor's office, county treasurer's office, probate judge's office, county recorder's office, sheriff's office, or office of the clerk of the courts, an aggregate amount to be ascertained by computing thirty per cent. on the first two thousand dollars or fractional part thereof, forty per cent. on the next eight thousand dollars or fractional part thereof, and eighty-five per cent. on all over ten thousand dollars, of the fees, costs, percentages, penalties, allowances and other perquisites collected for the use of the county in any such office for official services during the year ending September thirtieth next preceding the time of fixing such aggregate sum; provided, however, that if at any time any one of such officers require additional allowance in order to carry on the business of his office, said officer may make application to a judge of the court of common pleas, of the county wherein such officer was elected; and thereupon such judge shall hear said application and if, upon hearing the same said judge shall find that such necessity exists, he may allow such a sum of money as he deems necessary to pay the salary of such deputy, deputies, assistants, book-keepers, clerks or other employees as may be required, and thereupon the board of county commissioners shall transfer from the general county fund, to such officers' fee fund, such sums of money as may be necessary to pay said salary or salaries.

"Notice in writing of such application and the time fixed by such judge for the hearing thereof shall be served by the applicant, five days before said hearing upon the board of county commissioners of such county. And said board shall file in said proceeding their approval or disapproval of the allowance asked for and shall have the right to appear at such hearing and be heard thereon; and evidence may be offered.

"When the term of an incumbent of any such office shall expire within the year for which such an aggregate sum is to be fixed, the county commissioners at the time of fixing the same, shall designate the amount of such aggregate sum which may be expended by the incumbent and the amount of such aggregate sum which may be expended by his successor for the fractional parts of such year."

Section 2981 of the General Code provides:

"Such officers may appoint and employ necessary deputies, assistants, clerks, book-keepers or other employees for their respective offices, fix their compensation and discharge them, and shall file with the county auditor certificates of such action.

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Such compensation shall not exceed in the aggregate for each office the amount fixed by the commissioners for such office. When so fixed, the compensation of each duly appointed or employed deputy, assistant, book-keeper, clerk and other employee shall be paid monthly from the county treasury, upon the warrant of the county auditor."

Salary statutes and laws for the compensation of public officials, and their deputies, or assistants, must be strictly construed against the claimant. *Richardson v. State*, 66 O. S., 108; *Clark v. Lucas Co. Com.*, 58 O. S., 107; *State ex rel v. Culbertson*, 6 N.P.(N.S.), 311; *In re County Commissioners*, 7 N.P.(N.S.), 8; *Debolt v. Cincinnati Tp.*, 7 O. S., 237.

But, in construing a statute, whether the strict or liberal rule is applied, the interpretation should be reasonable and consistent with the language used, and with the object in view to promote the purpose sought to be attained by the enactment.

It was said, in the case of *Theobald v. State*, 10 C.C.(N.S.), 175 (30 C. D., 418), which was an action involving the constitutionality of the salary law,

"that in contemplation of the act the fees no longer attach to the officer but to the office, and to the extent they are not needed to support the office, they are devoted to the general good. It can not be said that the officer is entitled to claim the fees as perquisites belonging to him by virtue of his office. The Legislature has always bestowed or denied them at pleasure.

"The law recognizes the necessity for an additional working force in some of the offices of the counties. The existence of the necessity, and its extent, are questions of fact, local in their character, and should therefore be referred to some local tribunal for determination."

The Legislature in its discretion has conferred such authority upon the county commissioners, and clothed that body with a very broad discretionary and administrative or governing duty and power in connection therewith. *Trustee v. White et al*, 48 O. S., 577-580; *Linten v. Linn Co. Com.*, 7 Kan., 79-82; *Urbana Tp. v. Houston*, 1 C. D., 335 (2 N. P., 14); *Long v. Miami Co. Com.*, 75 O. S., 539-547; G. C. 2980, 2980-1, 2981, 2982, 2983, 2985, 2997, 3001, 3002.

The power so conferred upon the county commissioners by the act as a whole should be looked to in determining the meaning and intent of any particular section thereof.

What then is the intent, meaning and purpose of Sections 2980, 2980-1 and 2981, with respect to the duties, powers and responsibilities of the county commissioners? Are such commissioners permitted to make allowances as a matter of course, simply because some official desires or requests it, without regard to the needs of the public service and without regard to the requirement of the office needing an assistant? We think not.

We think these sections when construed in the light of the entire act, and the purpose and intendment thereof, enjoin upon the county commissioners grave duties, powers and responsibilities, which they must exercise with care and deliberation to the end that the public funds be not dissipated, or the public service injured by any act of commission or omission of duty on their part.

This construction is consistent with the intent and purposes of the salary act, and is necessary to give effect to the duty and power conferred upon the county commissioners to regulate and limit the expenditure of the public funds to the actual needs of the public service. It also harmonizes the duties and powers conferred by the enactment, and does no violence to the rights and privileges of the county officer prescribed by Section 2981, to appoint and employ deputies, etc., and to fix their compensation.

Such officer may appoint and employ deputies, etc., only when the county commissioners, or the court, in a proper case for such purpose, have made an allowance therefor. The provisions of this section, that such officer may fix the compensation of such deputies, etc., means that which has been ordered and prescribed by the county commissioners or the court.

If we are correct in our interpretations of these statutes, then it follows that there can be no deficiency in the fund provided for compensating the deputy of the applicant.

In any event, it is clear that there can be no deficiency in the fund allowed by the county commissioners and the former

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judge of this court for the month of July as claimed by the applicant, for the reason that the mandatory provisions of Section 2981 require that the compensation of deputies appointed or employed by a county officer can be paid to such deputy in equal monthly installments only upon the warrant of the county auditor.

The county auditor is not authorized to issue a warrant for such compensation to deputies and clerks, except in conformity to the allowance made by the county commissioners or the court, if any, under the provisions of Sections 2980, 2980-1 and 2981, and upon such deputy or clerk having first complied with the provisions of Section 2988.

The provisions of Section 2981, that county officers may employ necessary deputies, etc., and fix their compensation, does not create a liability against the county if no allowance or compensation has been fixed by the county commissioners or the court under the provisions of the statutes. *Halpin v. Cincinnati*, 2 Gaz., 386; *Lease's Claim*, 4 C. C., 3; *Strawn v. Com.*, 47 O. S., 404-408; *Clark v. Com.*, 58 O. S., 107; *Butler Co. v. Welliver*, 12 C. C., 440; *Clark v. Lucas Co.*, 14 C. C., 349; *Tuall v. Lucas Co.*, 3 N. P., 112; *Reeves v. Griffin*, 29 B., 281.

The broad discretionary and administrative or governing power conferred upon the county commissioners by the salary enactment, as we have shown, is not an arbitrary one. The county commissioners must act in reference to it with legal and not arbitrary discretion in the bestowal or refusal of the public funds to the various county officers for clerk or deputy hire.

This brings us to a consideration of the provisions of Section 2980-1, which provides:

“That if at any time any one of such officers require additional allowance in order to carry on the business of his office, said officer may make application to a judge of the court of common pleas, of the county wherein such officer was elected; and thereupon such judge shall hear said application and if, upon hearing the same said judge shall find that such necessity exists, he may allow such a sum of money as he deems necessary to pay the salary of such deputy, deputies, assistants, book-keepers, clerks or other employees as may be required, and thereupon the board

of county commissioners shall transfer from the general county fund to such officer's fee fund, such sum of money as may be necessary to pay said salary or salaries.

"Notice in writing of such application and the time fixed by such judge for the hearing thereof shall be served by the applicant, five days before said hearing upon the board of county commissioners of such county. And said board shall file in said proceeding their approval or disapproval of the allowance asked for and shall have the right to appear at such hearing and be heard thereon; and evidence may be offered."

As stated heretofore, the contention of the applicant in this proceeding is that this provision clothes the judge with ministerial and discretionary duties only, and in consequence such judge may allow or not allow the sum asked in this instance at his pleasure.

With such conclusion this court is unable to agree. Without extending this opinion with a review and citation of the numerous authorities upon this point, it is sufficient to say that, in the opinion of this court, the duties enjoined by this statute upon the court or judge are not ministerial in any sense, but that such statute confers a clear and unequivocal judicial power which must be exercised in a judicial capacity. This being true, it follows that the facts of each case must warrant an allowance, or none can be ordered.

What facts or circumstances then should be shown to justify the court or judge in making an additional allowance under this section of the act in question?

We have already pointed out the intent and purpose of this enactment, as well as the rule of construction to be applied in construing the same, and we think that a proper interpretation of this provision constrains us to hold, and we do hold, that an additional allowance under it should be ordered only when a necessity for the good of the public service is reasonably and clearly shown to exist and the county commissioners are without authority to meet the exigency; and in such cases as it is so shown that a necessity for the good of the public service exists and that the county commissioners have acted unreasonably

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and abused the power conferred upon them in the premises. Neither of these contingencies is shown to exist in the proceeding at bar. It follows that the application must be denied.

**UNREASONABLE DELAY IN PRESENTATION OF A
CALL NOTE.**

Common Pleas Court of Hamilton County.

THE SECOND NATIONAL BANK OF CINCINNATI, OHIO, v. CHARLES
F. DOLLE AND J. A. BRIGEL.

Decided, June 10, 1912.

Promissory Notes—Endorser Released from Liability—By Unreasonable Delay in Presentment—Burden on Holder to Show Reason for the Delay.

A petition asking judgment on a note, payable on demand after date without interest, is open to demurrer on the part of an accommodation endorser, where it appears that more than three years elapsed before presentment, demand and notice were made, and there is no averment that the holder exercised due diligence in the matter of presentment and demand and no averment of a reasonable cause for the delay.

Charles M. Leslie, for plaintiff.

Charles F. Dolle, contra.

GORMAN, J.

This is an action on a promissory note against Charles F. Dolle and J. A. Brigel. The plaintiff sets out a copy of the note with all the indorsements thereon in the short-form of pleading. Charles F. Dolle appears to be the maker of the note, and the Second National Bank, of Cincinnati, is the payee. On the back of the note is the indorsement of J. A. Brigel, a stranger to the note, and not in the chain of title.

After setting out a copy of the note and alleging the amount to be due thereon and all the indorsements, the amended petition

avers that on March 24th, 1910, plaintiff demanded payment of said note, which was refused, and on said date plaintiff notified said J. A. Brigel, that said note had been presented for payment, which was refused. The date of the note is November 1st, 1906. There are no other averments in the amended petition with reference to the presentment, demand, non-payment and notice, except those hereinabove stated. Prayer is for a judgment against both defendants for \$2,500.

The defendant, J. A. Brigel, demurs to the amended petition on the ground that the allegations thereof do not state a cause of action against him.

The amended petition upon its face shows that almost three years and five months elapsed after the date of the note, and before presentment, demand and notice were made. The note is payable on demand after date without interest.

Under the negotiable instruments act, the defendant, Brigel, is an indorser, Section 8168, General Code, which provides that "a person placing his signature upon an instrument otherwise than as maker, drawer or acceptor, is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity." There is nothing in the indorsement of Brigel, to indicate that he intended to be bound in any other capacity, and, therefore, under this section, he is an indorser. Now, the liability of an indorser under the negotiable instruments act, Section 8171, is as follows:

"Every indorser who indorses without qualification engages that on due presentment it (the instrument) shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or any subsequent indorser who may be compelled to pay it."

By the terms of Section 8188, General Code. "The instrument is dishonored by non-payment when it is duly presented for payment and payment is refused or can not be obtained."

By the terms of Section 8176, "When the instrument is payable on demand, presentment must be made within a reasonable

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time after its issue." And by the provisions of Section 8186 of the General Code,

"Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence."

By the terms of Section 8194, General Code, "when a negotiable instrument has been dishonored by non-payment, or non-acceptance, notice of dishonor must be given to the drawer and to each indorser."

Section 8207 provides that the notice to the indorser may be given as soon as the instrument is dishonored; and unless delay is excused, as hereinafter provided, must be given within the times fixed by this chapter.

By Section 8208, "when the person giving and the person to receive notice reside in the same place notice must be given on the same day of the dishonor."

There is no question that the notice of dishonor was duly and legally given on the same day of the dishonor. The only question involved in this case as the court construes it is, whether or not the amended petition upon its face shows that the presentment, demand and refusal to pay were within a reasonable time, or whether or not due diligence was exercised by the holder of the note in demanding payment from the maker.

By the express terms of our statute above cited, Section 8176, General Code, presentment of a note payable on demand must be made within a reasonable time after its issue. Now the question of what is a reasonable time has been held in many cases to be a question of law where there is no dispute as to the facts. Upon the facts of this amended petition, it appears that more than three years elapsed after the issue of the note before presentment and demand were made. And under the authorities in this state as well as those in other states, it appears to the court that this lapse of time shows that presentment and demand were not made upon the maker within a reasonable time. In

other words, it is an unreasonable delay on the part of the holder of the note to wait three years and five months before presenting the note to the maker and demanding payment thereon.

In the *14th Volume of the Encyclopedia of Pleadings and Practice*, pages 540, 541, under Subdivision 4, Time of Presentment and Demand, this rule is laid down:

“A declaration (a petition) is demurrable which apparently shows on its face that the plaintiff has been guilty of laches in making his demand for payment.”

This statement is supported by the case of *Estell v. Vanderveer*, 5th N. J. Law, 908, where the court holds that a declaration or count on a note, dated December 6th, 1813, payable in ten days, and payment demanded January 1st, 1814, is faulty on demurrer; holds further, the demand not made until January 1st, shows that due diligence was not exercised. The demurrer was sustained to this count on the ground that the declaration showing the date of the note and the demand, was made more than fifteen days after it became due, does not contain a lawful cause of action.

Prior to the passage of the negotiable instruments act our own Supreme Court in several cases had occasion to pass on the question of reasonableness of the time of presentment and demand. In the case of *Bassenhorst v. Wilby*, 45 O. S., 333, the court held that a note that was not presented to the maker and demand made for payment within a reasonable time after its date, discharged the indorser. To the same effect is *Walker v. Stetson*, 14 O. S., page 89; *Davis v. Herrick*, 6 O. S., page 66. In *Walker v. Stetson*, 14 O. S., *supra*, the court held that, “what constitutes due diligence in giving notice to the drawer or indorser of commercial paper of the dishonor of the same when the facts are ascertained or admitted, is a question of law.” And in *Davis v. Herrick*, 6 O. S., *supra*, the court said on page 66:

“The question of diligence is one of law and for the court in all cases where the facts are ascertained.”

In *Bassenhorst v. Wilby*, 45 O. S., *supra*, the court said:

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“What is a reasonable time is generally a mixed question of law and fact. Where the facts are in dispute it should be submitted to the jury for its determination under proper instructions from the court, but where the material facts are admitted, or not disputed, it is a question for the court and can not properly be submitted to the jury.”

In the case of *The Commercial Bank v. Zimmerman*, 185 N. Y., 210, the court held:

“Where it appears from the undisputed facts in an action upon a note payable on demand with interest, that the indorsement was without consideration and for the maker’s accommodation, that its payment was secured by a deposit of certain securities; that notwithstanding two years after the making of the note, plaintiff had complained to the indorser of its non-payment, and twice, a year later, had written that the maker was in default as to the interest, no steps were taken to charge the indorser by presentment of the note by protest or non-payment until more than three and a half years had elapsed, and until the indorser had died intestate, and an administrator to his estate had been appointed, the question whether the note was presented within a reasonable time is a question of law to be determined on such facts, and a decision that said note was not presented within reasonable time after it was issued, and that said plaintiff did not demand payment thereof, or did not give notice of the dishonor thereof within a reasonable time was not erroneous.”

In the case of *Zaloom v. Ganin et al*, decided last year and reported in 129 N. Y. Supplement, page 85, the court says:

“Where no question of fact is in dispute, the determination of what is reasonable diligence in presenting a check for payment in order to charge the drawer, is one of law.”

This case cites and approves the case of *Bank v. Zimmerman*, 185 N. Y., 210. The check in this case was dated August 4th, 1910; delivered between four and five o’clock the afternoon of that day. On the following day, August 5th, the check was deposited in the bank, and on August 6th, 1910, was presented for payment at the bank upon which it was drawn in the regular course of business. Payment was refused because the state

bank examiner had taken possession of the bank upon which the check was drawn, and the bank had suspended payment. It was held in this case there was an unreasonable delay in the presentment of this check.

There are numerous authorities which hold that a delay of a few months without any excuse being given therefore in presentment and demand of a note payable on demand, is an unreasonable delay.

It was held in *Bank v. Zimmerman*, 185 N. Y., *supra*, that the burden is upon the holder of a note to prove due and timely presentment and notice of dishonor. The negotiable instruments act casts upon him the burden of proving that the requirements were all complied with. They were necessary conditions to his right to recover. Presentment of a demand note within a reasonable time is a requirement of the statute. Our negotiable instruments act was copied largely, or almost verbatim from the New York act, and by the terms of Section 8176, General Code, must be made within a reasonable time after its issue.

If it is necessary for the holder of the note to prove upon the trial of his case that he exercised due diligence in the matter of presentment and demand for payment, it appears to the court that he must also aver or allege that which he is called upon to prove. This amended petition fails to aver that the plaintiff, the holder, exercised due diligence in the matter of presentment and demand; fails to allege that the demand was made within a reasonable time after issue, but on the contrary the date of the note and the averment as to the time of presentment and demand showed an unreasonable delay under the authorities, holding that a much shorter delay than that shown in this case is an unreasonable delay.

It would appear that the amended petition is defective.

Now, it is contended by counsel for plaintiff that the matter of an unreasonable delay is a defense to be pleaded by the defendant, and his contention in this regard appears to be supported by the case of *German American Bank v. Mills*, 99 Appellate Division, N. Y., page 312. But this case was cited by counsel for the appellant in the later case of *Bank v. Zimmerman*, 185 N. Y., *supra*, together with several other authorities

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in support of their contention, that the unreasonable delay is a matter to be pleaded by the defendant, and is not available for the defendant unless pleaded. While the court of appeals in the New York case cited 185 N. Y., does not in its opinion refer to this case in the 99th appellate division, it was decided two years prior to the rendition of the decision by the Court of Appeals in 185 N. Y. Nevertheless the court appears to have disposed of this claim on page 218 and 219, where Judge Gray uses the following language:

“Therefore, I think it would be incorrect to hold of this defense that it is of an affirmative nature, and, like the defense of usury, or any other defense which avoids an obligation, that it must be pleaded to be available.”

The court appears to answer directly the contention of counsel who cited the 99th appellate division case. Counsel also cite Section 610, last edition of Daniels on Negotiable Instruments, as supporting his contention that the failure to present and demand payment is a matter that must be pleaded in defense, but the author says in this section:

“When the facts are ascertained, it is for the court to determine what is a reasonable time as a matter of law.”

Now, even though it may be contended that the claim of an unreasonable delay in making presentment and demand is a matter of defense analogous to the statute of limitations, nevertheless in this state it has been held that where a claim upon the face of the petition appears to be barred by the statute of limitations a demurrer will lie, and this was the rule adopted in this state prior to the amendment of the section relating to demurrers which now make one of the grounds of demurrer that the cause of action set up in the petition is barred by the statute of limitations.

The only difference that existed prior to this amendment is that the demurrer prior to the amendment had to be predicated upon the ground that the petition upon its face did not state facts sufficient to constitute a cause of action. See: *Zuellig v. Hemerlie*, 60 O. S., 32; *Scymore v. Railway Co.*, 44 O. S., 12;

Combs v. Watson, 32 O. S., 228; *Hamilton & R. H. Co. v. C., H. & D. R. R. Co.*, 29 O. S., 245; *Comr's of Delaware County v. Andrews*, 18 O. S., 49; *McKinney v. McKinney*, 8 O. S., 423; *Osborn, Admr., v. Portsmouth N. B.*, 61 O. S., 427.

In the case at bar, inasmuch as the amended petition shows a lapse of three years and five months between the date of the issue of the note and the date of the presentment and demand for payment without any circumstance to show the cause of this delay, the court is of the opinion that the plaintiff has failed to state a cause of action against the indorser, Brigel, on this note.

By the provisions of Section 8186 the delay may be accounted for so as to show a good cause of action in the plaintiff, but in the opinion of the court it is not incumbent upon the defendant to set up, and show as a matter of substantive defense, that there was no reason for the delay, but that the burden is upon the plaintiff to establish a reasonable cause for the delay, and in order to establish these facts he must set out in his amended petition averments which would tend to show a reasonable cause for delay. Now this section provides that when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct or negligence, the delay in making presentment for payment is excused, but when the cause of delay ceases to operate, presentment must be made with reasonable diligence. It appears to the court that if there is a long delay, then under this section there must be some excuse furnished by the holder, because the very language of the statute appears to put the burden upon the holder of showing some excuse for the delay and further requires him to make presentment with reasonable diligence when the cause for the delay has ceased to operate.

In this case it may be that the plaintiff can amend his amended petition by showing an excuse for this unreasonable delay, but in the form of the amended petition as now presented to the court, it is not proof against the demurrer.

The demurrer will, therefore, be sustained on behalf of J. A. Brigel.

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CONSTRUCTION OF THE SALARY LOAN ACT.

Common Pleas Court of Cuyahoga County.

**THE CLEVELAND COLLATERAL LOAN CO. V. JOHN C. BELL AND
ARTIE W. BELL.**

Decided, April, 1915.

Usury Under the Haas Law—Promissory Note Drawing Eight Per Cent. Interest—Usurious When Payable in Installments Before the Principal Sum Becomes Due—Drastic Feature of the Haas Law—Usurious Note and Mortgage Ordered Canceled.

1. A promissory note is usurious although drawing only eight per cent. interest, where the stipulation is for eight per cent. on the "principal sum," which however is made payable in monthly installments during the year for which the note is made to run.
2. Where there is incorporated into the note a provision that, in case an action is brought in any court for its collection, a reasonable attorney's fee of not less than ten per cent. shall be included in any judgment entered by the court, the note is also rendered usurious by reason of that provision.
3. By the terms of the Haas bill such a note is void, together with the mortgage securing it, and in an action to enforce its collection a decree will be entered cancelling both the note and mortgage.

Ammerman & Thompson, for plaintiff in error.
White, Crosser & Curtis, contra.

GOTT, J.

This case comes into this court by way of error proceedings from the municipal court of the city of Cleveland. Plaintiff is a corporation and has taken out its license under favor of Section 6346-1-7 of the General Code of Ohio, generally known as the Haas Bill, for the purpose of making chattel loans.

Suit was brought in the court below by plaintiff upon the following note:

"\$117.96 No.....CLEVELAND, OHIO, November 28, 1911.

"Twelve months after date I promise to pay to the order of The Cleveland Collateral Loan Company, One Hundred and Seventeen 96/100, at 480 Prospect Avenue, payable in twelve

monthly installments of \$9.83 each, beginning January 5, 1912. Balance payable.....19.. with interest at eight per cent., per annum, payable annually after maturity. Upon failure to pay any installments or interest as they become due, the whole sum then unpaid on this note shall become due and payable, at the option of the legal holder hereof. In case this note be not paid when due and payable, and action is brought in any court to collect, a reasonable attorney fee of not less than ten per cent. shall be included in any judgment entered by the court.

"JOHN C. BELL.

"ARTIE W. BELL."

For a second cause of action the plaintiff set up a chattel mortgage upon certain furniture owned by the defendants and prayed for a foreclosure of the same. The court below found that the note was usurious, and construing Sections 6346-5 and 6346-7 of the General Code, held that the note, being usurious, was entirely void and that plaintiff could not recover upon it, and the court thereupon ordered a cancellation of both the note and the mortgage, and its action in so doing is now here for review.

There are two questions to be considered; first, was the note usurious? And, second, if it was usurious, can the plaintiff recover on the note and can it have a foreclosure of its chattel mortgage?

First, was the note usurious? Sub-section 5 of the act is as follows:

"No such person, firm or corporation shall make a loan upon chattels or personal property of any kind whatsoever, or purchase a salary or wage earning of another at a rate of interest or charge in excess of eight per cent. per annum upon the principal sum." In addition to such eight per cent. per annum a reasonable charge may be made for investigation, examination, collection and all other charges of whatsoever kind or description, not to exceed ten per cent. (10%) upon the principal sum, and any contract conveyance or assignment for the purpose or assignment of any salary or wage earnings and any loan upon chattels or personal property whatsoever shall be void and of no binding effect which provides for or contemplates the payment of any amount or sum in excess of the rates of charges herein provided for or where any provision of Section 3 (G. C. Sec.

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6346-3) herein has been disregarded or violated. In case any loan or contract of any kind provided for in the preceding sections is not paid when due, and interest of eight per cent. per annum may be charged on such balance due, but no extra charges shall be made for said renewal or extension of said loan or contract, within one year from the date of the loan or any renewal or extension thereof."

What is the meaning of the language "at a rate of interest or charge in excess of eight percent. per annum upon the principal sum?" It might be observed in the first place that the matter of the rate of interest is entirely within the legislative control, and the Legislature may classify the money loaning business and fix a rate for each classification. *Cramer v. Trust Company*, 72 O. S., 395; *Brooklyn B. & L. A. v. Desnoyes*, 4 C.C.(N.S.), 337.

The law has defined what is meant by interest and in 12 O. D., 405, it is defined as follows:

"Interest is the compensation which the law allows for the delay in the payment of an obligation after the maturity thereof."

One of the common definitions of interest, and undoubtedly a correct one is found in the old arithmetics. The court recalls the one in Ray's Third Part, Arithmetic:

"Interest is money paid for the use of money." The length of time it is to be used varies, but no matter what the time may be, we have an expression which is used as a basis for the rate in all cases, and that phrase is the Latin phrase *per annum*, meaning *by the year*.

Let us get at the underlying principle from a simple note:

"One year after date, I promise to pay to the order of John Doe, one hundred dollars with interest at 8 per cent, per annum, for value received.

"RICHARD ROE."

Here Richard Roe is entitled to the use of one hundred dollars for one whole year, and for that he must pay John Doe eight dollars interest, usually at the end of the term, though banks get their interest in advance and it is called bank discount;

and other individuals may demand that the interest be paid either in advance, or semi-annually or annually without rendering the transaction usurious.

Section 5 says that the rate of interest was not to be in excess of "eight per cent. per annum" on the "principal sum." We have found that *per annum* means *by the year*. Now what does the statute contemplate by the words "principal sum"? I conclude that it means nothing more than the amount loaned by the year; not any charge to be added for investigation, examination, or collection as provided by the statute; not any interest to be added in advance, just the actual money loaned, and the rate per annum to be figured upon this actual loan.

[The installment note is not of ancient origin. The law of negotiable instruments was made when the installment note was unknown. It does not fit in with the theory that eight per cent. per annum meant that the borrower was to have the use of the one hundred dollars for a whole year for the sum of eight dollars. What the installment note does is as follows: A borrower gets the use of one hundred dollars for the first month only, for at the end of the first month he makes a payment which lessens the principal, which the borrower is entitled to keep for the whole year, and so on from month to month as payments are made, the principal growing less and less, though the borrower, according to the statute and usage, is entitled to the use of the principal sum for the whole year.

The mere fact that, under an installment note, it is harder to compute the interest is no reason we should construe the statute in favor of the theory that the principal sum loaned per annum is the original sum loaned, though such original sum is used by the borrower for only a period of one month. The principal sum loaned on the note in question is as follows: \$100 for one month, \$90.17 for one month, \$80.34 for one month, \$70.51 for one month, and so on until the last payment is made. The problem in mathematics is more difficult, but with our present idea of interest, such must have been the legislative intent by the use of the terms "eight per cent, per annum upon the principal sum"; otherwise, "per annum" would be superfluous in the statute, would be without any meaning whatsoever.

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It is said that Section 3 of the statute aids in the construction of the statute. This section provides that the borrower shall be given a card which shall have written upon it the amount of the interest charged, and it is said that on the installment note you can not calculate the interest in advance so that the amount can be placed upon the note. This I have already demonstrated is not true, the only difference being it is more difficult to figure the interest on an installment note, but any good mathematician could develop a table by which it would be a simple matter to figure the interest on such a note.

The statute allows a charge of eight per cent, per annum upon the principal sum, and if the contention of the plaintiff is correct, by its arrangement on this note, it would have received nearly twelve per cent. upon the actual amount it loaned to the defendant, the difference of four per cent. being what plaintiff would gain by getting payment by installments in advance of the full year. The court therefore holds that the rate of interest provided in the note is in excess of eight per cent., and the note is therefore usurious.]

The note also contains the provision that in the event action is brought in any court to collect, a reasonable attorney's fee of not less than ten per cent. shall be included in any judgment entered by the court, and the note is usurious also by reason of that provision. As far back as 10 Ohio, page 381, Wood, J., in the case of *State v. Taylor*, held that such a stipulation was against public policy and void. "It must be admitted," said the court, "if this agreement can be enforced, the statutes of Ohio regulating the rate of interest * * * are at once virtually repealed." This case is followed in the following cases in Ohio: *Shelton v. Gill*, 11 O., 417; *Martin v. Bank*, 13 O., 250; *Leavens v. Bank*, 50 O. S., 591.]

Of course, the matter as to the rate of interest permissible being entirely within the legislative control, that body could, if it saw fit, provide for an additional charge for attorney fees in case of suit brought, but no such legislative enactment has been brought to my attention. Surely Section 8107 of the General Code, cited by plaintiff confers no such authority upon the money lender. This section simply defines what is a sum certain within the meaning of the negotiable instrument act.

Reverting to Section 6346-5 it will be recalled that that section permits plaintiff to charge ten per cent. additional for *examination, investigation, and collection*, and it is admitted that such a charge of ten dollars was made in the note in question. Having had the ten per cent. allowed by the statute for collection, it is usurious to again stipulate for an attorney's fee for collection by court action.

Second. The note being usurious at the legal rate, may plaintiff recover upon it, and the interest at the legal rate, and may plaintiff have a decree of foreclosure upon his chattel mortgage, or is the note and mortgage securing the same illegal and void?

I think that it will be admitted by every one that, under the general law in Ohio, the fact that a note was usurious did not prevent a recovery upon the note for the amount loaned together with the legal rate of interest. This matter has long been regulated by statute.

Section 8306 of the General Code, whose original history dates back to 46 Ohio Laws, page 55, is as follows:

"Payments of money or property made by way of usurious interest, whether made in advance or not, as to the excess of interest above the rate allowed by law at the time of making the contract, shall be taken to be payments made on account of principal; and judgment shall be rendered for no more than the balance found due, after deducting the excess of interest so paid."

Our Supreme Court interpreted this section in a great many decisions, and I shall not take the time to quote from these decisions, but will cite them only, as the principle is too well established to admit of doubt. 10 O. S., 441; 22 O. S., 492; 12 O., 153; 29 O. S., 587; 39 O. S., 12; 41 O. S., 4; 50 O. S., 682.

Generally, then, in Ohio a usurious loaner of money could recover on the note the amount loaned. Has the Haas bill, so-called, changed the situation? There are two sections of the Haas bill that are inconsistent with each other, and our answer to this question depends upon which of the sections is to control.

Section 6346-5 contains the following:

"And any loan upon chattels or personal property whatsoever shall be void and of no binding effect which provides for or

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contemplates the payment of any amount or sum in excess of the rates or charges herein provided for," and

Section 6346-7 is practically a re-enactment of the general law as found in Section 8306, General Code.

Sub-section 7 of the Haas bill is as follows:

"When the rate is usurious, payments of money or property made by way of interest, whether made in advance or not, shall be deemed and taken to be payments made on account of principal, or may be recovered in an action before a court of competent jurisdiction, and no judgment shall be rendered against the borrower in excess of the amount of the principal borrowed, still due."

How shall the legislative act, which contains conflicting and irreconcilable provisions, be construed?

I had always understood that the clause which stood latest in position would control, but it seems that our Supreme Court, in the case of *State v. Mulhern*, 74 O. S., 363, has refused to follow this rule as laid down by Sutherland and other law writers, and has said that such rule of construction is purely arbitrary and not founded upon sound reason. The rule seems to be that:

"If the legislative intent can be gathered from the whole act, then that intent should govern, and other acts passed at the same session and other laws upon the statutes may be consulted in order to arrive at the legislative intent."

Looking at the act as a whole, and taking into view the other laws upon the statute books, can we ascertain the legislative intent, and if so, what is it?

Prior to the enactment of the Haas bill, we had Sections 9857 *et seq.* on the subject of "collateral loan companies," permitting them to loan on gold and silver plate and other goods and chattels at a rate not to exceed eight per cent. per annum, and a charge of not to exceed ten per cent. of investigation, collection, etc. There was no penalty for a usurious charge, and the loaner could recover on the note under favor of Section 8306, General Code, heretofore cited, his principal and the legal rate of interest, even though his rate was usurious.

The Haas bill under consideration is an addition to the existing laws. It adds to the duties of money lenders upon chattels—

1. By requiring them to take out a license.
2. By requiring them to give bond.
3. By compelling the lender to give the borrower a card showing his transaction.
4. By compelling the lender to have the wife of the borrower, if he be married, sign the contract, conveyance or assignment; and if the wife does not sign, the law renders the contract, conveyance or assignment absolutely void.
5. By making it a criminal offense, with a fine ranging from fifty to five hundred dollars, for violating *any* of the provisions of the statute.
6. By making under Section 5, which we are construing, any loan void and of no binding effect, when the contract provides for or contemplates the payment of interest in excess of eight per cent.

Is not the contention of the defendant, that the legislative intent was to render the note and mortgage void, strengthened by the fact that the act, without any equivocation, makes any violation of the law a misdemeanor punishable with the foregoing fine?

If the note in question did not bear the signature of the wife, is it not perfectly plain that by Section 4 the note would be void and of no binding effect, and is it not plain that under that circumstance the plaintiff could not recover upon the note?

It would seem that the legislative body not only desired to encourage the formation of reliable money loaning companies, but desired also to curb those who are not inclined to pay heed to laws regulating them, and to reach this latter class of persons these stringent features were added.

Since writing the foregoing opinion, there has been published the opinion of the Court of Appeals of Franklin County in the case of *Andrews v. State of Ohio* (21 C.C.[N.S], 284), in which that court construes some of the provisions of this act. In that case the court say:

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“That the purpose of the legislation underlying the provisions of this act, was to simplify the salary loan business and make it impossible for loaners to oppress the dependent class by exorbitant charges and by excessive assignments of salary.”

And that

“While it is true, as a general proposition, that doubtful provisions of criminal statutes are liberally construed in favor of a person charged with a criminal offense, yet this doctrine should not be carried so far as to destroy the efficiency and permit the evasion of the plain purpose of remedial acts. The business of making salary loans upon exorbitant charges, and upon written assignments for larger sums than were required to compensate the loaner, called for legislation.”

This has been a test case, and the plaintiff has honestly believed that the note was not usurious, and I have no doubt but that plaintiff will comply with the law when it is finally established. It would seem to be rather unjust to permit one class of money loaners to make usurious loans, and then to permit them to recover upon the note the principal sum loaned together with the legal rate of interest, while another class of money loaners are punished by making the contract void, and a fine administered for doing the same thing, and yet perhaps the Legislature may have foreseen that a greater stringency is required over one class of loaners than there is over another.

It has been suggested to me that there may be a recovery for the amount of the loan in an action “for money had and received,” but I am not called upon to pass upon that phase of the question, as this is a suit upon the note and for a cancellation of the mortgage, and is not a suit for money had and received, and it is sufficient in this case to pass upon the question of recovery upon the note and as to the foreclosure of the chattel mortgage. Inferring that the legislative intent is to punish the loaner on this class of loans by rendering his contract void if he shall charge a usurious rate of interest, as well as to create a new criminal offense for so doing. I have concluded that the judgment and decree of the municipal court is correct, and the same is affirmed, and will save exceptions for the plaintiff in error.

**NO ATTORNEY'S FEES FOR SERVICES BEFORE THE
INDUSTRIAL COMMISSION.**

Probate Court of Cuyahoga County.

IN RE JOHN CLAYTON, A MINOR.

Decided, May 28, 1915.

Workmen's Compensation Act—Makes no Provision for Fees to an Attorney Securing an Allowance to a Minor.

There is no authority under the workmen's compensation act of Ohio for an award of fees by the probate court to the attorney of the guardian of a minor for services in obtaining an allowance of compensation to the minor from the state industrial commission.

HADDEN, J.

Application for allowance of attorney's fees.

The firm of Thompson, Hine & Flory have rendered a bill for attorney's fees to the guardian of this minor. The bill amounts to \$50, and the fees were earned in connection with an award made by the Industrial Commission of Ohio, the award amounting to \$3,588. Shortly after the death of the father of this minor, the Industrial Commission seemed inclined not to make any award, for the reason that the minor was not living in Ohio but was staying with his grandparents in New York. After an investigation of the law, however, on the part of the attorney, and a conference with the secretary of the commission, the above mentioned award was made. The amount asked for is reasonable, in view of the work done, and the only question is whether an allowance can be made at all for attorney's services, under these circumstances.

It has been the impression of this court, ever since the passage of the original compensation act, in 1911, that in addition to providing more adequate remuneration for all injured employees, or the dependents of deceased employees killed while in the performance of their duty, as well as hastening the payments to those entitled to them, it did away with the need of attorneys altogether, and eliminated attorney's fees in all cases of personal injury and wrongful death. Nowhere in either the original

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act passed in 1911 (102 Ohio Laws, 524), or in the amended act passed in 1913 (103 Ohio Laws, 72), was any provision made for attorney's fees, except in one or two instances. Sections 1465-44 to 1465-51 (102 Ohio Laws, 526) provide for an investigation on the part of the commission of the circumstances surrounding the injury or death of the employee. The commission is to appoint agents, interview witnesses, take depositions, and make the award, all without the aid or assistance of an attorney. This is also borne out by Sections 1465-45, 69, 74, 83 and 91, as well as the tone of the whole act passed in 103 Ohio Laws, 72.

The investigation to be made by the commission, is to be made entirely independent of any attorney, either for the employer or for the employee; and Section 1465-74 provides that even in cases where employers have not come in under the provisions of this act, the injured employee, or in case of his death his dependent, may file his application for compensation with the commission, and they shall determine what is due, and the amount so fixed shall constitute a liquidated claim for damages, and in the event of the employer's refusal to pay, it may be recovered against him with an added penalty of fifty per cent. This action is to be brought in the name of the state, for the benefit of the person entitled to the same. So that even in a case where the employer has not come in under the provisions of the liability act, the law makes it possible for the employee to get a recovery without employing an attorney or having any expense for attorney's fees, whatsoever. And even in a case where the Industrial Commission refuses to make an award (1465-90), the claimant may sue the commission, and if he is successful, the costs of the proceedings, including the attorney's fees, will be taxed against the unsuccessful party, but the entire award will be paid out of the state insurance fund, in the same manner as other awards. There are to be no deductions for the costs of the proceedings or for attorney's fees. And it is a significant fact that the section just mentioned, and Section 1465-76, where the employer may be sued for his wilful act which has caused the injury or death of the employee, are the only ones in which a claim for attorney's fees may legally be allowed and paid.

And as if to emphasize the fact that attorney's fees are not to be paid except in the two instances mentioned, we have Section 1465-89 (103 Ohio Laws, 88), which reads as follows:

"In addition to the compensation provided for herein, the board shall disburse and pay from the state insurance fund, such amounts for medical, nurse and hospital services and medicine, as it may deem proper; not, however, in any instance to exceed the sum of \$200; and in case death ensues from the injury, reasonable funeral expenses shall be disbursed and paid from the fund, in an amount not to exceed the sum of \$150. And the board shall have full power to adopt rules and regulations with respect to furnishing medical, nurse and hospital services and medicine, to injured employees entitled thereto, and for the payment therefor."

It will be noticed that whenever the act speaks of the extra compensation which may be allowed, that is, compensation in addition to the award made by the commission, it only mentions medical, surgical, nursing, hospital and funeral expenses (Sections 1465-69, 72, 74, 78 and 101), and nowhere does it use any words or expressions which can be construed in any way as permitting the award made by the commission to be in any way liable for attorney's fees of any kind. The expenses above mentioned are to be paid in addition to the award. In other words, it seems to be the intention of the Legislature not to have the award diminished in any way, but the whole sum is to be for the dependents of the decedent.

This view is further strengthened by Section 1465-88, which makes all of this compensation "exempt from all claims of creditors, and from any attachment or execution, and shall be paid only to such employees or their dependents." And in addition to the above, Section 1465-86 makes the jurisdiction of the board continuing in each case, and it may from time to time modify its orders or findings, as in its opinion may be justified. It is thus plain to be seen that the board still has jurisdiction over this fund, unless it has all been paid over to the guardian. And at the time that this bill was under consideration by the Legislature, one of the great arguments urged in favor of its enactment into a law, was that no part of the award was to go for

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the attorney's fees, and everywhere throughout the whole act this idea seems to have been kept in mind, and the injured party or the dependents of the deceased are to get every penny of the award, and none of it is to go for attorney's fees.

If this is the intent and purpose of the statute, and I can see no escape from reaching such conclusion, then I do not see how an allowance for attorney's fees can be made in this or any other case, for to do so would be to nullify the intent of the statute. If an attorney has been hired and has done legitimate work in the case, as is true here, he must look for his pay to the party who hired him, or possibly have an allowance made by the commission, if they can see their way clear to doing so. But in the present situation of the law, I do not see how this court could make an allowance of this kind, and the request for attorney's fees will therefore have to be refused.

**WRONGFUL PAYMENT OF A CHECK TO AN UNIDENTIFIED
HOLDER.**

Common Pleas Court of Hamilton County.

S. GOLDBERG v. PEOPLES BANK & SAVINGS CO.*

Decided, January, 1913.

Banks and Banking—Liability of Bank Paying a Check to an Unidentified Holder.

Unless the circumstances are such as to amount to a direction by the drawer of a check to the bank upon which it is drawn to pay the check without reference to the genuineness of the endorsement, or a prior course of dealing warranting such payment, the bank is liable if payment is made on an unauthorized endorsement.

Chas. F. Hornberger and Harry R. Weber, for plaintiff.

Alfred Mack, contra.

HUNT, J.

S. Goldberg having an account with the Peoples Bank & Savings Company, in December, 1908, sent by mail a check to New York for \$94.07, payable to "Rudinsky Brothers." On January 6, 1909, a party having possession of said check and claiming to be of the firm of "Rudinsky Bros." presented the same at the bank. The paying teller declined to pay the check and directed the party to have S. Goldberg identify him. The holder of the check then requested Mr. Goldberg to cash the check, but he declined to do so. Shortly afterward, Goldberg met the holder of the check on the street. In response to the holders urgent request for money, Mr. Goldberg then went with him to the Queen City Bank, about two squares from the Peoples Bank, and drew two checks on the Peoples Bank in lieu of the first check, one for \$14, payable to bearer and endorsed in blank by S. Goldberg, and the other check for \$80.07 payable to the order of Rudinsky Bros., and delivered both checks to

*Affirmed by the Court of Appeals, *Peoples Bank v. Goldberg*, March 8, 1915.

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the party, saying, "I will take a chance on you for \$14." The holder of the checks then presented the \$14 check to the paying teller of the Peoples Bank, having made thereon the additional indorsement of "Rudinsky Bros." At the same time he again endorsed thereon "Rudinsky Bros." Thereupon the \$14 check was paid by the bank. The holder of the checks then presented the check for \$80.07 for payment, and endorsing "Rudinsky Bros." on such check, received the amount from the paying teller. The holder of the checks then made some explanation to the paying teller as to the reason why the original check was divided into two checks, but Mr. Goldberg knew of no such explanation. Mr. Goldberg did not communicate with the bank in any way during these transactions, except by way of the checks presented. The holder of the checks was not in fact a member of the firm of "Rudinsky Bros." and had no authority to endorse such name. In this action Goldberg asked for judgment against the bank for the amount of the second check, \$80.07, which was charged against his account.

The law of the case is well settled by the Supreme Court in the following cases:

Dodge v. Bank, 20 Ohio St., 234:

"The duty of a banker is to pay the checks and bills of his customer drawn payable to order, to the person who becomes holder by a genuine indorsement; and he can not charge him with payments made otherwise, unless the circumstances amount to a direction from the customer to the banker to pay the paper without reference to the genuineness of the indorsement, or are equivalent to a subsequent admission that the indorsement is genuine, in reliance on which the banker is induced to alter his position.

Armstrong v. Bank, 46 Ohio St., 512:

"In the absence of a course of dealing or understanding to the contrary between the parties, the duty of a banker is, in all cases, to pay the person named, or his order, where the terms of the check are such; and he may, and should withhold payment until fully satisfied as to the genuineness of the indorsement."

Practically the same rule is recognized in the case of *Murphy v. Bank*, 191 Mass., 159.

The cases of *Robertson v. Coleman*, 141 Mass., 231, and *United States v. Bank*, 45 Fed. Rep., 163, are no inconsistent with the above rules. Because in such cases the court finds that it was the intention of the drawer of the check that the money was to be paid to the person to whom the check was given, such person being recognized, or in the banker's terms, identified as the payee named. Even though the person to whom the check be delivered has authority to receive possession of the check, that does not authorize the bank to pay the check without proper endorsement. *Dodge v. Bank, supra*.

In the case at bar there are no circumstances amounting to a direction by Goldberg to the bank to pay the check without reference to the genuineness of the indorsement, nor was there any prior course of dealing or understanding, exempting the banker paying only to the payee as named or order; nor was there any intention that the check payable to Rudinsky Bros. should be paid to the person to whom the check was given without proper indorsement. On the contrary, the fact that the holder of the first check, after being refused payment for want of identification, came back with the check divided into two checks, one payable to bearer thereby eliminating the necessity of identification as to such check, the other payable to Rudinsky Bros., was itself notice that Goldberg had refused, or at least, seen fit not to identify the holder as the proper payee of a check payable to Rudinsky Bros., and intended that as to the \$14 check no identification should be required, but that as to the check for \$80.07, identification should be required.

Judgment is therefore given in favor of the plaintiff.

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**MONEY NEGLIGENTLY PAID BY A JUDGMENT DEBTOR
IN DISREGARD OF THE CLAIMS OF
CROSS-PETITIONERS.**

Common Pleas Court of Cuyahoga County.

THE CITIZENS SAVINGS & TRUST CO. v. CHRISTIAN
BURKHART ET AL.

Decided, October 29, 1914.

Revivor—Different Methods of Effecting—Granting of an Order of, Within the Discretion of the Court, Notwithstanding More than One Year Has Elapsed—Weight of Evidence Between Witnesses of Equal Credibility—Issuance of Summons Not Necessary on a Cross-Petition, When.

1. An order of revivor which was not made on motion of the successor in interest, or by supplemental petition with service upon him as the representative of the estate, or by consent of parties by an order nisi or conditional order, is subject to a motion to be set aside.
2. But where it appears that an application was made within a month after the validity of the original order was challenged and after it had stood for two years unchallenged, it is within the discretion of the court to grant another order upon a supplemental pleading, notwithstanding more than one year has elapsed since the death of the defendant and it is being insisted that on account of the delay the granting of such an order will be to the prejudice of intervening rights.
3. Where a cross-petitioner has obtained a lien on a fund due to the estate of a decedent, and the money is thereafter negligently paid over to the executor, the lien-holder can not be required to follow the fund, but may hold the original debtor therefor.
4. In the case of two men of equal credibility testifying as to the giving notice of such a lien—one that he personally gave the required notice, and the other denying that any such notice was given him—it will be assumed that the notice was given, for the reason that the receiving of such a notice might be easily forgotten while it is highly improbable that an honest man would testify as to a transaction which never occurred.
5. It is not necessary in Ohio that cross-petitioners, whose claims are confined strictly to the matter in issue in the petition, have

summons issued on their cross-petitions, but the summons issued on the petition is sufficient to sustain a judgment on the cross-petitions.

W. J. O'Neil, for plaintiff.

Cyrus Locher, Prosecuting Attorney, for commissioners.

Thompson, Hine & Flory, for the McIntosh Hardware Corporation and the Cleveland Lumber Co.

Treadway & Marlett, for George V. Brown.

Blandin, Rice & Ginn, for the Cleveland Trust Co.

FORAN, J.

Christian Burkhart in March, 1909, brought an action in the Court of Common Pleas of Cuyahoga County, Ohio, known as No. 112123, against the county commissioners of Cuyahoga county, Ohio, for \$1,640.90, which amount he claimed was due him on a contract for grading and paving a county road. The answer of the commissioners averred that by the terms of the contract five per cent. of the total amount due thereunder was to be retained as a guarantee that the improvements of the road would remain in good condition for the period of three years, and that the amount so retained, \$1,640.90, was, by agreement between the parties, deposited with the Euclid Avenue Trust Company, which bank failed in May, 1908.

The commissioners, by resolution, released all claim to the fund, and mailed to the plaintiff, Burkhart, the bank or pass book evidencing the deposit. The plaintiff returned the pass book and refused to release the county. The assignee of the bank offered to pay the plaintiff fifty per cent. of the claim, which offer was refused. On issue joined it was held, on November 29, 1912, that the county was liable for the whole amount deposited, with interest from the date of deposit. Neither appeal was taken nor error prosecuted by the commissioners from this finding or judgment of the court. On October 25, 1909, while the action of Christian Burkhart against the county commissioners was pending, the Citizens Savings & Trust Company brought an action, known as No. 115467, in the nature of a creditor's bill against Christian Burkhart, the

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county commissioners, the county treasurer, the county auditor, and the assignee of the Euclid Avenue Trust Company, claiming it had recovered a judgment against Christian Burkhardt in the common pleas court of this county, December 28, 1908; that the same was in full force and unpaid; that the defendant Burkhardt had no real or personal property subject to levy on execution, and praying that the county commissioners, the county treasurer, the county auditor and the defendant Burkhardt be ordered to apply to the payment of the judgment of the Citizens Savings & Trust Company any amount sufficient to satisfy the sum that might be found due from the county to Christian Burkhardt, upon the determination of the issues raised in the case of Christian Burkhardt against the county commissioners, known as cause No. 112123.

The Cleveland Lumber Company, George V. Brown, and the McIntosh Hardware Corporation, creditors of Christian Burkhardt, were by leave of court made parties defendant, and filed answers and cross-petitions in 1909, in the case of the Citizens Savings & Trust Company against Christian Burkhardt et al, and known as cause No. 115467, and asking for precisely the same relief prayed for by the plaintiff in that action.

Christian Burkhardt died on or about June 11, 1910, and his wife, Susan, was appointed executrix of his estate on or about June 25, 1910.

Christian Burkhardt was duly served with summons in case No. 115467, October 27, 1909, but filed no answer or other pleading in said case, although he did not die until over seven months after summons had been served upon him.

The trial and appearance dockets show this entry in cause No. 115467:

"May 10, 1911. Death of Christian Burkhardt suggested. Action revived in the name of Susan Burkhardt, executrix."

Who suggested, or at whose instance the cause was revived, does not appear. No formal written notice was filed, nor does it appear that the revivor was by consent of parties, or that the executrix was in any way notified of the revivor, and she ex-

pressly denies that she had such notice. That the death was suggested to the court, and the order of revivor made at the instance of some one interested, is self-evident, but none of counsel seem willing to assume the responsibility of having called the attention of the court to the matter.

The validity of this revivor is challenged, and a motion was filed May 19, 1913, to vacate and set aside the order of revivor by Susan Burkhart, executrix, for the reason that no notice of the same was given to her or summons issued or served upon her. If she was a party to the original action, it might be said that she had constructive notice of the revivor. This must be admitted, as it is well settled that when a person is served with summons in an action, he or she is bound to take notice of all subsequent proceedings in the action, but she was not a party to the action, and can not in any sense be charged with notice of this revivor. The county commissioners, however, did have notice that an order of revivor had been made in the action. In the case against the county commissioners, No. 112123, the action was subsequently in fact revived in the name of Susan Burkhart, executrix, on March 13, 1912, and this action has not been questioned or challenged, and its regularity will be assumed.

As bearing upon the *bona fides* of the executrix in filing the motion to vacate the order of revivor of May 10, 1911, it is significant that her counsel was also one of counsel for her husband, Christian Burkhart, deceased, and that over two years were allowed to elapse before the motion to vacate was filed.

On November 29, 1912, verdict against the county was rendered in cause No. 112123, for \$2,389.37. No motion for a new trial was filed by the commissioners, and judgment was entered on this verdict December 13, 1912, and approved for payment by the county commissioners December 14, 1912, two days after the judgment was entered, and the same was paid in full to Susan Burkhart, executrix of the estate of Christian Burkhart, deceased, December 19, 1912. Evidently no time was allowed to elapse after the rendition of the verdict until the same was paid. The claim of the original petitioner, the Citizens Savings & Trust

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Company, in cause No. 115467, was evidently in some way taken care of some time before the fund was paid to Susan Burkhart, executrix, for on October 26, 1912, the petition was dismissed at plaintiff's costs, leaving, however, the cross-petitioners the Cleveland Lumber Company, the McIntosh Hardware Corporation, and George V. Brown, for all purposes, plaintiffs in the action, as they did not consent to the dismissal of the petition of the original plaintiff. The action, that is, cause No. 115467, was still pending, and the rights of the cross-petitioners had been in no way determined or adjudicated when the county commissioners were served with summons in this cause, that is, No. 115467, on the 25th day of October, 1909, and strange as it may appear, the board of county commissioners never filed an answer or other pleading in the case until May 17, 1913, when an answer was filed to the cross-petition of George V. Brown, who had caused summons to be issued upon his cross-petition, which was served on the county commissioners December 22, 1909, two years before they filed an answer thereto. No summons was issued upon the cross-petitions of the Cleveland Lumber Company or the McIntosh Hardware Corporation. The county commissioners, however, must be presumed to have had notice of their claims, as the board was served with summons in the original creditor's bill brought by the Citizens Savings & Trust Company. The dismissal of the petition of the original plaintiff did not affect the status of the cross-petitioners. The action had not abated, and even if the order of revivor of May 10, 1911, was void or voidable, the action might be revived if proper proceedings were taken to effectuate that purpose. The motion of Susan Burkhart, filed May 19, 1913, to vacate the order of revivor of May 10, 1911, came on for hearing before Babcock, Judge, during the April term, 1913; and although no disposition was made of the motion, the court, by proper order, gave George V. Brown leave to file a supplemental petition to revive the action, that is, a supplemental petition praying for an order of revivor of this action in the name of Susan Burkhart, executrix. Accordingly Brown filed such supplemental petition June 2, 1913, upon which petition summons was issued and duly

served upon Susan Burkhart, executrix of the estate of Christian Burkhart, deceased, June 5, 1913. To this supplemental petition Susan Burkhart, executrix, filed an answer June 18, 1913, averring that the petitioner Brown had knowledge of her appointment as executrix in July, 1909; that he filed a statement of his claim with her as executrix; that she filed her final account as executrix of her husband's estate January 8, 1913, and that the same was duly approved; and finally, that more than one year having elapsed since her appointment, and before the supplemental petition was filed, no order of revivor can or should be made at this time.

Three questions are presented:

1st. Is the order of revivor of May 10, 1911, void or voidable?

2d. If the order of revivor of May 10, 1911, is void or voidable, can the action be now revived as prayed for in the supplemental petition of George V. Brown?

3d. Are the cross-petitioners, or either or all of them, in cause No. 115467, entitled to the relief prayed for?

As to the first question, there can be no doubt but that the order of revivor of May 10, 1911, is at least voidable and ought to be set aside. This order was not effected or made upon the motion of Susan Burkhart, executrix of her husband's estate, or by supplemental petition with service upon her as the representative of her husband's estate, as provided in Section 11402, General Code, nor was it effected by consent of parties or by an order *nisi* or conditional order as provided for in Sections 11403, 11404 and 11405, General Code. These sections provide that the order may be made or the revivor effected on the motion of either the adverse party or the successor in interest of the party who died, and "when not made by consent, the order shall be served upon the party adverse to the party on whose motion it was made in the same manner and returned within the same time as the summons." The motion, therefore, to set aside this order of revivor, of May 10, 1911, will be granted.

The next question presented is—can the action be now revived in the name of Susan Burkhart, executrix of the estate

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of Christian Burkhart, deceased, as prayed for in the supplemental petition of George V. Brown?

Service was had upon this supplemental petition, and Susan Burkhart, executrix, duly notified of its pendency, as has been stated, and she filed her answer thereto. About two years, however, had elapsed from the appointment of Susan Burkhart as executrix before the supplemental petition was filed. Section 11410, General Code, provides that, an order to revive an action against the successor of a defendant shall not be made without consent of such successor or representative, unless it is made "within one year from the time it could first have been made;" and Section 11411, General Code, provides, an order to revive an action in the name of the successor of a plaintiff may be made forthwith, but can not be made of right without the consent of the defendant after the expiration of one year from the time it might first have been made. These sections are, in effect, limitations upon the right of revivor, but by Section 11402 it is provided that, "the limitations contained in the subsequent sections of this chapter do not apply to this section." Section 11402, General Code, is practically the same as Section 5149, Revised Statutes, which reads as follows:

"A revivor may be effected by the allowance by the court or a judge thereof in vacation of a motion of the representative or successor in interest to become a party to the action, or by supplemental pleading alleging the death of a party, and naming his representative or successor in interest upon whom service may be made as in the commencement of an action; but the limitations contained in subsequent sections of this chapter do not apply to this section."

A comparison of the two sections will show that, outside of slight changes in phraseology, the sections are identical. Original Section 39 of the civil code, S. & C., 958, reads as follows:

"An action does not abate by the death, marriage or other disability of a party, or by the transfer of any interest therein during its pendency, if the cause of action survive or continue. In case of the marriage of a female party, the fact being suggested on the record, the husband may be made a party with his

wife; and in the case of the death or other disability of a party, the court may allow the action to continue by or against his representative or successor in interest, in the name of the original party. In the case of any other transfer of interest, the action may be continued or the court may allow the person to whom the transfer is made to be substituted in the action."

In *Paper Company v. Bragg*, Superior Court of Cincinnati, 7 N. P., 166, it is said in the syllabus:

"To allow a revivor against a deceased party is within the discretion of the court, although more than a year has elapsed from the time the order might have been made."

In the opinion the court say, that in passing Section 5149, Revised Statutes, the codifiers distinctly refer to not only Section 39, but also to the 24th O. S., 182, and the 29 O. S., 87. In the case of *Carter v. Jennings*, 24 O. S., 182, the court, in the syllabus, say:

"The court has power, under Section 39 of the code, in the exercise of a sound discretion, to allow the action to be prosecuted by or against the representative or successor in interest of a deceased party. For this purpose, supplemental pleadings may be allowed and process served as in the commencement of an action."

In this case there was no motion made for a conditional order of revivor within one year from the time the suit could have been first revived, but the court held, as has been seen, that it was within the sound discretion of the trial court to allow the cause to be revived, and be prosecuted by or against the representative or successor in interest of the deceased party, by a supplemental petition or pleading.

In *Black v. Hill*, 29 O. S., 87, *Carter v. Jennings*, 24 O. S., *supra*, is approved, and the court in the syllabus say:

"The mode provided in title 13, chap. 1, of the code for the revivor of actions, is not exclusive, but the court has power, under Section 39, in the exercise of a sound discretion, to allow the action to be prosecuted by or against the representatives or successor in interest of a deceased party."

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And in the case of *Pavey v. Pavey*, 30 O. S., 600, it is held in the syllabus, that the court is authorized under Section 39, on the application of the plaintiff and good cause shown, to allow the representative of a deceased defendant in error to be made a party to the proceeding, and to direct the case to be carried on against such representative, although more than a year may have intervened from the death of such defendant to the time of making the application.

As has been seen, that portion of old Section 39 of the Civil Code referred to in these decisions was carried into Section 5149 of the Revised Statutes, and now appears in substance in Section 11402, General Code. There can, therefore, be no question but that the court has a right to grant the prayer of the supplemental petition of George V. Brown. That this may be done, and that it is within the discretion of the court to grant the prayer of the supplemental petition of George V. Brown, is admitted by the counsel for the county, but it is insisted that because Brown unduly delayed his application, to the prejudice of intervening rights, the application should be denied. A moment's reflection will show that there is no force in this contention. On May 10, 1911, an order of revivor was made and entered by the court. The validity of this order was not questioned or challenged until May 19, 1913, over two years after it had been made and entered or allowed, at which time Susan Burkhart filed her motion as executrix to vacate it, alleging in her affidavit filed with the motion that the entry was made without her knowledge or consent, and without notice to her. If it is true, as a matter of fact, that counsel for the cross-petitioners did not, as they insist, cause this entry of May 10, 1911, to be made, they ought not to be charged with laches in that regard, for they had a right to assume the order was effected at the instance of Susan Burkhart, executrix. No one else except her and the petitioner and the cross-petitioners had any interest in the controversy, and if, as a matter of fact, the cross-petitioners did not cause this order to be made, it necessarily must have been made at the instance of Susan Burkhart, executrix. However, counsel for the executrix is just as posi-

tive that he did not, on behalf of his client, procure the allowance of this order. The fact that a motion is made to vacate it is a confession that the order remains in effect until revoked or set aside. Motions are not always in writing. In many instances, motions of this kind are made *pro forma*, the court assuming they are either made at the instance of the party asking for the order or that they are made by consent of the parties. The order may have been made and allowed upon oral motion, or by consent of parties in open court, and that fact be not noted by the court upon the trial docket or the court calendar. Counsel for the cross-petitioners can not be charged with actual notice of the death of Christian Burkhart, while counsel for the executrix of his estate must be so charged, as he appears as counsel of record for both parties, and yet he has filed an affidavit that the revivor was entered or allowed without his knowledge or consent; and as he has filed this affidavit that the revivor was entered or allowed without his knowledge or consent, the court must conclude that whoever caused the order to be made has really forgotten the circumstance. But, inasmuch as the cross-petitioner Brown filed a supplemental petition praying that the action be revived June 2, 1913, within a month after the revivor of May 10, 1911, was questioned and challenged, we can not see how it can be said that he unduly delayed or was in any way negligent in the matter. No one had a right to assume or act upon the assumption that this order of revivor of May 10, 1911, was necessarily or absolutely void. There are hundreds and perhaps thousands of revivors entered and made upon the records of our courts in precisely the same language and without the formality of a written motion, indicating at whose instance they were made or allowed, or that they were allowed by consent of parties, and no one questions their validity. As the order might have been made upon the motion of Susan Burkhart, executrix, or might have been made by consent of parties, it was not absolutely void. The court had jurisdiction in the premises, and the court had a right to make the order, and the record does not disclose a want of jurisdiction. Of course it is well settled that when it appears from the face of the record that the court did not have jurisdiction of the

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person or subject-matter, such an irregularity as we find here can be inquired into, and it can be found that the order or judgment rendered was not only erroneous, but void, and of no effect. *Chapman v. Bolton, etc.*, 4 O. C. C. 242.

It has been frequently held, that although the decree or order of a court is reversible for error, where the record does not show affirmatively a necessary fact, yet because a court of general jurisdiction has assumed to exercise jurisdiction and to make the order, it will be presumed that notwithstanding the silence of the record, the court had a right to make the order, and it was for this reason that counsel for the executrix filed his motion to set this order aside, and supported that motion by his affidavit to the effect that no service of summons was made upon his client, Susan Burkhart. See *Moore v. Starks*, 1 O. S., 369.

Where a court has jurisdiction of the subject-matter of an action, and the form of the action in which suit is brought, and the parties are before the court by proper process, its judgment in the case, though erroneous, is not void. The jurisdiction is not ousted by the erroneous exercise of the power which it confers. *Moore v. Robison*, 6 O. S., 302.

After this order of May 10, 1911, had stood for two years unquestioned and unchallenged, it may be suggested at least that the *bona fides* of the motion to vacate or set it aside is open to ethical criticism. The prayer of the supplemental petition of George V. Brown will therefore be granted, and the action will be revived against Susan Burkhart, executrix of the estate of Christian Burkhart, deceased; and it is further found that he is entitled to the relief prayed for in his cross-petition. It is conceded that Brown obtained an equitable lien upon the claim which Christian Burkhart, deceased, held against the county. *Dunbar v. Harrison et al*, 18 O. S., 24; *Cincinnati v. Hafer*, 49 O. S., 60.

It is also conceded that the county could not prejudice the rights of Brown by the disposition of the fund made by the county. 49 O. S., 60, *supra*.

But it is contended, with a subtlety of reasoning that does credit to the genius of counsel, that the primary liability rested upon Burkhart's estate, and that the lien attaching to Burk-

hart's claim against the county was not divested by the payment to the executrix of his estate, but followed the fund into her hands, and that Brown must look to her for relief. The prayer of Brown's cross-petition, however, is, that the county commissioners be enjoined from paying any amount that might be found to be due to Burkhart, and that they be required to appropriate from the amount found due Burkhart a sum sufficient to pay Brown's claim.

In the agreed statement of fact, it is said that counsel for the cross-petitioner, George Brown, would testify that a few days before the county commissioners paid the fund in question to the executrix, he called upon the commissioners and saw the clerk of the board; that he informed the clerk of the board that the action, No. 115467, was still pending, and that if the county commissioners paid this fund before that action had terminated and the rights of the parties had been determined, they would do so at their peril. It is also said in the agreed statement of facts that the clerk of the board of county commissioners would deny that such notice had been served upon him as clerk of the board. Under the rules of evidence, even admitting that both the gentlemen are of equal credibility, it must be held that the notice was given. Human memory is fallible. Men do forget. And while it is possible to understand that a man may have forgotten all about a transaction that took place, it is impossible to conceive that an honest and a sane man could possibly remember a transaction that never existed. Therefore it seems that the board not only knew of the existence and pendency of this action, because of the summons that had been served upon its members, but they also had direct and positive notice that the action had not terminated and that the rights of the parties had not been determined. Paying the fund under such circumstances must certainly be said to be gross negligence. To say that it was mere inadvertence would be a characterization not at all commensurate with the facts. In this connection it may be fair to say that the gentlemen who are now acting as counsel for the board of county commissioners were not acting as such at the time these transactions arose.

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While the action was pending, with full knowledge of its pendency and the prayer and claim of Brown, the county paid the whole amount of Burkhart's claim against the county to the executrix of his estate. Why should Brown be required to follow the fund if he had a lien upon it in the hands of the county commissioners? By a parity of reasoning, Brown's lien could be said to follow the fund into whosoever hands, not only the county, but the executrix, may have paid it. If Christian Burkhart's estate is insolvent, what becomes of his lien, or of what value is it? Indeed counsel for the county seem to recognize the absurdity of the contention, for they frankly say, "It may at once be candidly admitted that a due sense of caution in avoiding the possibility of future complications would have prevented payment (by the county) until the rights of the claimants had been finally disposed of; but was not the payment legal, and was not the plaintiff equally careless?" We have already answered the last question; Brown was not careless. He acted as soon as he had notice that the validity of the order of revivor of May 10, 1911, was questioned. He had a right to assume it would not be questioned, and that it had been duly entered, especially as it had stood unchallenged for two years. We are not here concerned with the relations existing between the county and Susan Burkhart, executrix of the estate of Christian Burkhart, deceased. Brown, in effect, attached the fund in the hands of the county commissioners, and has a right to look to them or to the county, and is not required to follow the fund into other hands. To so hold would destroy the very purpose and object of a creditor's bill, or even a lien by attachment.

By Section 11760, General Code, it is provided that when a judgment debtor has not personal or real property subject to levy on execution sufficient to satisfy the judgment, any equitable interest which he has in real estate or any interest he has in a money contract, claim or chose in action, due or to become due to him, or any claim he has in a judgment or order, or any money or goods or effects which he has in the possession of any person, shall be subject to the payment of the judgment "by

action." A proceeding under this section is in the nature of a creditor's bill. *Dunbar v. Harrison*, 18 O. S., 24, *supra*.

It is in reality in the nature of a lien. By filing the creditor's bill, he obtains preference over other creditors. *Miers v. Turnpike Company*, 13 Ohio, 197.

The proceeding is really a proceeding in the nature of a proceeding in aid of execution, and the judgment creditor acquires a lien on the property in question from the time of serving the notice, as provided in Section 11772, General Code. *Bank v. Manufacturing Company*, 67 O. S., 306.

The commencement of an action in the nature of a creditor's bill gives to the plaintiff priority over creditors of the defendant not holding specific liens upon his interest in the property in suit. *Tischler v. Tischler*, 21 O. C. C., 166.

And where several judgment creditors are pursuing the same equitable assets of their common debtor, they are entitled to satisfaction in the order in which their liens attached by the filing of their bills. *Miers v. Turnpike Co.*, *supra*.

Within the limitations just mentioned, then, it must be held that Brown and the other cross-petitioners acquired a lien upon this fund, that is, the fund in the hands of the county commissioners for which Burkhart, in cause No. 112123, brought suit; and the county commissioners had no right and were in no way justified in disposing of the fund or paying it to Susan Burkhart, executrix, until the rights of these cross-petitioners had been determined and adjudicated.

In the case of *P. A. Geier v. Reliance Electric Company*, decided by this branch of the court, March 28, 1913, and found in the 14 N.P.(N.S.), 353, it was held that "a garnishee who has been served with process in two different actions and has filed answers in both, is not relieved from liability for payment of the claim in the second case by compliance with an order made in the first case for payment to the clerk of court of the amount due the judgment debtor from the garnishee, the satisfaction therefrom of the claim involved in said first case, the transmission of the remainder to the non-resident debtor, and the discharge of the garnishee from further liability."

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This opinion was affirmed by the court of appeals of this county. In that case the garnishee was served with summons by both parties, and filed answers in both cases. When the first case came on for hearing the garnishee obtained an order from the court of common pleas to pay the amount due the first attaching creditor and transmit the balance to the non-resident debtor, the order of the court relieving the garnishee from further liability. But it was held that, inasmuch as the garnishee had notice of the pendency of the other action, and the claim of the other petitioner to the fund, the garnishee was not relieved from liability by the order of the court of common pleas to pay the first claim and transmit the balance to the non-resident debtor.

The next and last question presented is, are the other cross-petitioners, the Cleveland Lumber Company and the McIntosh Hardware Corporation, entitled to the relief prayed for in their cross-petitions? And this depends upon the question whether it was necessary for them to have summons issued upon their cross-petitions, and served upon the county commissioners, notifying them of the pendency of their claims.

In the case of *Southward v. Jamison et al*, 66 O. S., 290, it was held that, "So long as a cross-petition in an action is strictly confined to matters in question in the petition, the summons issued on the petition would be sufficient notice to sustain a judgment rendered on the cross-petition."

In the original action the Citizens Savings & Trust Co., plaintiff, in effect says that it had obtained a judgment against Christian Burkhart; that there is pending in the court of common pleas a suit in which defendant Burkhart is plaintiff against the board of county commissioners, asking for judgment against the commissioners for \$1,640.90 with interest; and it prays that upon the determination of the issues raised in that case, that is, cause 112123, the defendant Burkhart be adjudged to apply to the payment of the plaintiff's judgment above referred to, and interest thereon together with costs, any amount found to be due to him from the county commissioners or the Cleveland Trust Company, where the money had been deposited.

An examination of the cross-petition of George V. Brown, the Cleveland Lumber Company and the McIntosh Hardware Corporation shows that they are asking for precisely the same relief upon a precisely similar state of facts; and these cross-petitions are strictly confined to the matters in question in the petition of the Citizens Savings & Trust Company.

In the case of *Brown v. Kuhn*, 40 O. S., 468, this question was not directly decided, but it was expressly stated in the opinion of the court in that case that under our code there is no provision for the issuance of a summons on a cross-petition against a defendant who is already in court; that it is only needful or proper to do so when new parties are made by the cross-petition; and that, as a cross-petition, under our statute, can only ask relief touching the matters in question in the petition, there is no necessity for service of summons on parties already in court; that being there, it is their duty to examine the files and see what defenses or claims are set up by the parties to the cause with relation to the matters in controversy. It is true that these cross-petitioners could not go into the action brought by Burkhart against the county commissioners and others, and known as cause 112123, and obtain relief without service of summons upon the plaintiff and upon the defendants in that action, and for the reason that Section 11760, General Code, provides that this relief must be had "by action." But when the Citizens Savings & Trust Company began its suit in the nature of a creditor's bill, under Section 11760, General Code, and known as 115467, it did proceed "by action." It is not contended that any of the cross-petitioners who went into cause No. 115467 could obtain judgment against each other without new summons issued and notice served upon the person against whom such judgment might be claimed; but that is not the case we have here. Section 11346, General Code, provides that, "the answer or demurrer of a defendant to an answer demanding affirmative relief shall be filed on or before the third Saturday, the reply or demurrer thereto on or before the fifth Saturday, and the demurrer to the reply on or before the seventh Saturday after such answer is filed." So it will be

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seen that the code authorizes a defendant to file a cross-petition asking for affirmative relief, either legal or equitable, against the plaintiff or the defendant touching the matters in question in the petition; and the statute makes no difference between plaintiffs and defendants pleading to cross-petitions. Each is given "until the third Saturday after the answer demanding affirmative relief shall be filed," not after the return day of the summons, nor after service of summons upon him. This language is significant. It presumes that every plaintiff and every defendant knows when a cross-petition is filed, and must prepare himself to reply to the same within the time given. *Bailey v. Lee*, 14 Hun, 524; 1 *Bates Pleading and Practice*, 589; *Draper v. Moore*, 2 C. S. C., 167.

Of course it must be conceded that an answer demanding affirmative relief is in effect a cross-petition. When these cross-petitioners, that is, the Cleveland Lumber Company and the McIntosh Hardware Corporation, by leave of court, became parties in cause No. 115467, and filed their answers and cross-petitions therein, which answers and cross-petitions were confined strictly to the matters in question in the petition itself, the county commissioners and Burkhart were bound to take notice that such cross-petition had been filed. When the Citizens Savings & Trust Company began this action against Burkhart, the county commissioners and others, these defendants were called upon to answer that petition, and they were thereafter bound to take notice of all proceedings that were strictly germane thereto. Of course they were not bound to keep watch for entirely new causes of action which might be injected into the case, but so long as the cross-petitioners strictly confined their claims to the matters in question in the petition, that is, to the fund in question, and the relief sought by them was precisely the same as that sought by the petitioner, there can be no doubt that the summons issued on the petition would be sufficient to sustain a judgment on the cross-petitions. See *Southward v. Jamison*, 66 O. S., *supra*, page 313.

It can not be said that this holding will contravene the constitutional right of the county commissioners to have their day

in court, because they were served with summons in the case of the Citizens Savings & Trust Company, and had full notice of the claims of that plaintiff and the character of the claim made by it in case No. 115467, and if they had answered in that case and the case came to trial, they would then have full notice that other cross-petitioners had intervened, and the county would have had its day in court. The county and its commissioners were put upon guard, that parties who had precisely the same character of claim as the Citizens Savings & Trust Company might intrude into that case, and that they had a right to intrude and come into the case for the purpose of asserting any claims they might have against Burkhart, and obtaining an order in equity against him.

It therefore must be held that the cross-petitioners, the Cleveland Lumber Company and the McIntosh Hardware Corporation, are entitled to the relief prayed for in their cross-petitions, and a decree will therefore be entered for the cross-petitioners, and a journal entry prepared accordingly.

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**ACTION TO RECOVER A COMMISSION BY ONE WHOSE
AGENCY HAD BEEN TERMINATED.**

Common Pleas Court of Hamilton County.

JOSEPH P. MCCUDDEN v. HARRY H. BROCKMEYER.

Decided, June, 1915.

Agency—Attempt of Agent to Represent Both Parties—Relieves Both from Liability for His Services, When—Test as to Whether an Agent is a Mere Middleman—Revocation of Agency—Charge of Court.

1. An agent who assumes to act for both parties in a transaction can not recover compensation from either party, even upon an express promise, unless it is clearly shown that each principal had full knowledge of all the circumstances connected with his employment by the other and had assented to the double employment.
2. In order to determine whether or not an agent is a mere middleman, reference must be had to the contract of employment, and where the contract of employment authorizes the agent to sell the property and confers authority to negotiate, the agent is not then a mere middleman and therefore can not act for the other party to the transaction without the consent of his principal, and in the event that he does so he can not recover the compensation fixed in his contract.
3. Where it appears from the evidence that the plaintiff was employed as agent to sell, among other things, a state license to traffic in intoxicating liquors, and the principal was informed before the consummation of the transaction that the board of liquor license commissioners would not consent to the transfer of any license that had been brought about by the negotiations of the agent, the principal had the right under those circumstances, while acting in good faith, to revoke the agent's license, and an instruction to the jury that if they found under the circumstances that the agent's authority to sell was in good faith revoked by his principal, the agent would not be entitled to a commission, notwithstanding that the sale was subsequently made to a party with whom the agent had been negotiating, is not erroneous.

William F. Fox, for the motion.

Thomas K. Schmuck, contra.

GEOGHEGAN, J.

Two grounds are assigned by counsel for plaintiff as a reason for setting aside the verdict of the jury in favor of the defendant and for granting a new trial herein, to-wit, the giving of two special charges which counsel for plaintiff excepted to at the time.

The first special charge is as follows:

"If you find from the evidence that McCudden acted as agent for both Pieper and Brockmeyer in the sale of the latter's property, and if you find that this was not known to and assented to by both Pieper and Brockmeyer, I charge you to return a verdict for the defendant."

This action is based upon a written contract between McCudden and Brockmeyer as follows:

"It is hereby understood that J. P. McCudden & Son, No. 322 Main street, has the right to sell saloon and grocery at No. 912 Central avenue; no definite time is made and owner has right to sell same as he see fit in his own right; owner has right to reject anything transacted in this respect; owner and undersigned agrees to pay 5% on the deal to Mr. McCudden if sale is made by him alone. Harry H. Brockmeyer."

It seems that Brockmeyer was the owner of a saloon and grocery, which he was desirous of selling, as well as the license that had been granted to him to conduct the saloon. McCudden was engaged in the business of acting for prospective sellers and buyers of saloons and saloon licenses. McCudden furnished Brockmeyer with the name of one Folken, and Brockmeyer and Folken completed negotiations for the transfer of the grocery and saloon and license, but the liquor license commissioners for Hamilton county refused to grant a transfer of the license of Brockmeyer to Folken, and consequently the deal fell through. Either at the time of the application for the transfer of the license to Folken, or subsequent thereto, Brockmeyer was informed by one of the clerks of the liquor license commission that no transfer of a license would be granted if McCudden had anything to do with the deal. The testimony is conflicting as to

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whether it was prior or subsequent to the time of this declaration to Brockmeyer that McCudden furnished him with the name of Pieper, but at all events Brockmeyer and Pieper subsequently made a deal for the transfer of the grocery and saloon and license, and the transfer of the license was approved by the liquor license commissioners.

Brockmeyer claims that subsequently to his obtaining the information that the liquor license commissioners would not transfer any license, in the negotiations for the transfer of which McCudden was concerned in any way, he notified McCudden that he revoked the authority granted to him in the written contract above set forth.

The plaintiff admits that he had a contract with Pieper whereby, if he secured a saloon and license for Pieper, he would obtain a commission from him.

The instruction complained of above was given under the authority of *Bell v. McConnell*, 37 Ohio St., 396, wherein it was held:

“The double agency of a real estate broker, who assumes to act for both parties to an exchange of lands, involves, *prima facie*, inconsistent duties; and he can not recover compensation from either party, even upon an express promise, until it is clearly shown that each principal had full knowledge of all the circumstances connected with his employment by the other which would naturally affect his action, and had assented to the double employment. But when such knowledge and consent are shown, he may recover from either party.”

Counsel for plaintiff contends that the doctrine announced in this case has no application to the case at bar, the principal reason being that in this transaction McCudden acted as a mere middle man in whom no trust or confidence was reposed other than that of merely bringing the parties together, whereas, in the case of *Bell v. McConnell* there was trust and confidence reposed and the agent was charged with the duty of at least assisting in the consummation of the transaction.

In the case of *Bell v. McConnell* the errors complained of were the refusal to give a certain charge requested by the plaintiff, and

a charge given by the court. The charge refused was to the effect that if the defendant knew that the plaintiff was acting for both parties and assented thereto and assented to the fact that he was to receive a commission from both parties, that plaintiff would be entitled to recover. The charge given was as follows:

"That if you find that Neal employed plaintiff to sell or exchange his farm in Boardman for cash or property, and agreed to pay him for such services, and if, while so employed, defendant Bell and others, employed plaintiff to find a purchaser for their (defendant's) city property, or one who would exchange country property for it, and if plaintiff's duty was simply to bring the buyer and seller together, and for that service defendants agreed to pay plaintiff a fixed amount, and if plaintiff performed that service the defendants are bound in law to pay said amount so fixed, even though plaintiff was acting as agent for the party—in this case Neal—so introduced.

"But I say to you, if the contract between plaintiff and defendants was, that plaintiff should sell for, or assist the defendants in selling or exchanging their property, and did so sell or exchange defendant's property, or assist them in selling it to, or exchanging it with Neal, while he was also acting for Neal, or assisting him in the same sale or exchange, under a contract with said Neal for pay on the part of said Neal for such services so rendered him, then plaintiff is not entitled to your verdict in this case, even though both Bell and Neal were aware of, and assented to said plaintiff's employment and acts in the premises."

McIlvaine, Judge, in his opinion in this case says:

"This case presents the single question: Can a real estate broker, who assumes to aid both contracting parties in making an exchange of real estate, recover compensation for his services from either, upon an express promise to pay, in a case where each principal had full knowledge of and assented to the double employment?

"It has been decided (*Rupp v. Sampson*, 16 Gray, 398, and *Seigel v. Gould*, 7 Lans., 177), and is not doubted, that such broker may recover from both or either where his employment was merely to bring the parties together; and it is equally clear, both upon principle and authority, that in case of such double

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employment he can recover from neither, where his employment by either is concealed or not assented to by the other. Several reasons may be given for this rule. In law, as in morals, it may be stated that, as a principle, no servant can serve two masters, for either he will hate the one and love the other, or else he will hold to the one and despise the other. Luke 16: 13."

The difficulty, however, presented by the case of *Bell v. McConnell* is, whether the court was laying down a rule of general public policy that no man should act as agent in any capacity for two parties to a transaction, or, whether the court was simply laying down the rule that a person who acted as an agent with some further duty or discretion in the matter other than that of merely bringing the parties together could not recover from either party, and this difficulty is not a little enhanced by the affirmance of the district court, which reversed the common pleas court for the failure to give the charge as requested and the giving of the charge that it did give. Now it will be observed in the reading of the charge that the court did give, that the court charged the jury that if the duty of the plaintiff was simply to bring the buyer and seller together, the plaintiff could recover even though he was acting as agent for the other party; but that if the plaintiff was to sell or assist the defendants in selling or exchanging their property, why then he could not recover, even though both parties were aware of and assented to said plaintiff's employment and acts in the premises, and I must confess that I have read this case a number of times and have been unable to determine to my entire satisfaction just whether the objection to the charge was to the rule laid down in the first paragraph of the charge as given, or to that laid down in the second paragraph, or to both.

So, therefore, some recourse must be had to the authorities in order to determine whether or not the charge complained of in the case at bar was a correct application of the law to the contract between the parties to this case.

The earliest important case upon this subject is the case of *Rupp v. Sampson*, 16 Gray, 398, decided in 1867, wherein it was held:

“If a middleman brings together a buyer and a seller, each of whom has agreed, without the knowledge of the other, to pay the middleman a commission on any contract which may be made between them, and a contract is made between them, in the making of which the middleman takes no part as agent for either, the conduct of the middleman in concealing from each his agreement with the other is not fraudulent, and is no defense to an action brought by him against either to recover the commission agreed upon.”

And the court in that case clearly distinguishes between a middleman, who simply undertakes to bring buyer and seller together, and one employed as a broker to buy or sell goods, holding that in the latter case it would be a fraud for the agent to conceal his agency for one from the other.

This case was followed with approval in *Siegal v. Gould*, 7 Lansing, 177, decided in 1872, wherein the same distinction was pointed out, the contract, however, not being that the plaintiffs, who were real estate brokers, should sell, but that they should find a purchaser for the property placed in their hands, the court holding that “the case would have been quite different if the plaintiffs had been employed as agents of the defendant to buy or sell.”

This same distinction was pointed out in *Knauss v. Brewing Company*, 142 N. Y., 70.

So it would seem that the determination as to whether this instruction was correct depends entirely upon the construction of the contract entered into between the parties.

It will be observed that this contract provided that McCudden was to sell and that he was to get five per cent. on the deal if the sale was made. Now, while it is true that all McCudden did was to bring the parties together, and it is conceded by Brockmeyer that if the Folken transaction had gone through he would have paid the commission, and it is further conceded by Brockmeyer that all that McCudden did with reference to the Folken contract was to send Folken to Brockmeyer and that thereupon they made their own terms, nevertheless, it can not be denied that by the explicit language of the

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contract McCudden was charged with the duty of selling, and therefore it seems to me that the doctrine of *Walker v. Osgood*, 98 Mass., 348, decided November, 1867, is applicable to the circumstances of this case, and if it is the instruction given is undoubtedly correct. In that case it was held:

“A broker employed to sell or exchange property, under a written promise of compensation in case he sends a customer with whom a sale or exchange is effected, becomes agent of the owner, and can not properly act for a customer; and, if he exacts from a customer a conditional promise of compensation before sending him to the owner, can not recover any compensation from the owner for services, although a sale or exchange is effected with such customer.”

The contract sued upon in that case was as follows:

“If you send or cause to be sent to me by advertisement or otherwise any party with whom I may see fit and proper to effect a sale or exchange of my real estate above described, I will pay you the sum of two hundred dollars.”

The defendant in that case resisted the demand for the stipulated commission on the ground that the plaintiff was employed for a compensation by the other party in the same transaction. The lower court ruled that this would not of itself defeat the claim, assuming that the stipulation signed by the defendant expressed the whole obligation of the defendant, so that he had merely to show a compliance with it to entitle him to the sum named. But the Supreme Court at page 351 say:

“But the plaintiff’s employment as a broker involved something more than this. Even if he had no authority to bind his principal, and was intrusted with no discretion in fixing the terms of the exchange, and his only service was to bring the parties together, he was bound to perform that service in the interest of the party who employed him. Such employment is not like the offer of a reward for the performance of some act which another may undertake or forego as he shall please. Employment implies acceptance of the service. A broker thus employed does not act in good faith if he turn aside all proposals

that are not accompanied with an additional retainer or commission. Yet such is the temptation upon him, if he may levy a fee from both parties. When he has secured the retainer of the other party, he is interested, in order to win his double commission, to bring together these two, to the exclusion of all others. The interests of his principal are in danger of prejudice from this counter interest in the agent. And besides, the broker is ordinarily and almost inevitably intrusted, to a greater or less extent, with the confidence of his principal, and a knowledge of his views and purpose. This is incompatible with like relations to the other party. From the very nature and necessities of the case, such twofold interests and relations of the broker are inconsistent with the interests of the principal, and should not be maintained without his knowledge and consent."

The court distinguishes the case of *Rupp v. Sampson*, *supra*, by holding that the circumstances surrounding the transactions in *Rupp v. Sampson* were different and devolved no such degree of duty upon the agent as they did in the case which the court had before it.

And in *Scribner v. Collar*, 40 Mich., 375, the court, in construing the written contract in that case, uses language which can be applied to the terms of the contract upon which this action is brought:

"The writing placed the property for sale or exchange in plaintiff's hands and then reserved an option as to whether the final disposition should be a sale or an exchange and expressly required defendants to afford the plaintiffs all the assistance he could in making such sale or exchange. The contract had large scope and went much further than to constitute the plaintiffs mere middlemen to bring some particular third person, or even any one in general, into a position to negotiate with the defendant. It conferred authority to negotiate and reposed trust and confidence and contemplated that the plaintiffs should act in defendant's interest and should exert their judgment and their influence in his behalf."

Now, applying the aforesaid principles to the contract entered into by the parties in the case at bar, it would seem that Brockmeyer having authorized McCudden to sell the property,

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he constituted McCudden something more than a mere middleman. In that view the instruction was not erroneous.

The second instruction complained of is as follows:

“If you find from the evidence that McCudden’s authority to sell Brockmeyer’s property was revoked in good faith, and that thereafter Brockmeyer made a sale of the property to a person with whom McCudden had been negotiating, I charge you that the plaintiff is not entitled to a commission from Brockmeyer on such sale.”

There does not seem to be any doubt but what a broker’s authority may be revoked at any time in good faith, and it does not matter if a sale is made thereafter to the very party with whom the broker was negotiating. *Gardner v. Pierce*, 116 N. Y. Supp., 155; *Bailey et al v. Smith*, 103 Ala., 641; *Uphoff v. Ulrich et al*, 2 Bradwell (Ill. App.), 399.

But even if this rule in its strict application be doubted, certainly under the circumstances of this case Brockmeyer, in the exercise of good faith, after he had been informed that the liquor license commission would not transfer any license that had been brought about by the negotiations of McCudden, had a right to revoke McCudden’s authority.

The law of Ohio with reference to the transfer of liquor licenses must be read into and made a part of this contract, just the same as if it were expressly contained therein. The law authorizing the granting and transferring of liquor licenses gives a wide discretion to the liquor license board in the transfer of licenses; in fact, so broad a discretion that when the question of the constitutionality of the act was presented to me it was urged that this discretion was so broad that it amounted to the conferring of judicial powers upon a purely administrative board (*Ex Parte Scott*, 15 N.P.[N.S.], 321). So that it would seem that under the peculiar circumstances of this case, and having this information in mind, there was a perfect right on the part of Brockmeyer to revoke McCudden’s authority, and it can not be complained of that subsequently he entered into negotiations with some person whose name had been suggested to him by McCudden, and the defendant was entitled to an instruction

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under these circumstances to the effect that if he acted in good faith in revoking McCudden's authority, he could not be held liable if subsequently thereto he succeeded in making a deal with some person whom McCudden had suggested to him.

The motion will therefore be overruled.

COMPLICATIONS IN DISTRIBUTION OF AN ESTATE.

Common Pleas Court of Franklin County.

GEORGE S. MARSHALL, ADMINISTRATOR, v. MARGARET BASH ET AL.

Decided, April Term, 1915.

Distribution—Course of Descent to Heirs of a Childless Couple—Apportionment of the Debts of Each of the Decedents Among Their Respective Heirs.

Some years following the death of A, his wife (they were childless) died leaving personalty, some of which came to her through A, and also two pieces of real estate, both under mortgage, one of which she inherited from A and the other was bought by her after his death. Upon distribution, *Held*:

That the personalty not derived from the estate of the husband should be applied toward the payment of the debts of the wife; that from the proceeds from the sale of each piece of realty the mortgage thereon should be paid, and to the balances remaining should then be added the proceeds from the husband's personalty one-half to each; the remainder of the wife's debts will then be paid, the amount so required being taken from the two estates respectively, the heirs contributing thereto in proportion that the value of the property coming to them bears to the whole estate; the heirs of the wife will then take the remainder of the proceeds from the sale of her realty and one-half of the proceeds remaining from the sale of the husband's realty and one-half the proceeds from the husband's personalty and his heirs will take the remaining one-half of the husband's realty and one-half the proceeds from the husband's personalty.

George S. Marshall, for plaintiff.

Jerry Dennis and John R. Horst, for J. W. Ansel heirs.

T. M. Sherman, for Minerva Ansel heirs.

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BIGGER, J.

The plaintiff, as administrator, and by motion, asks the court to marshal the assets of the estate for sale and payment of the debts of the estate.

It appears that the plaintiff is the administrator of the estate of Minerva Ansel, deceased; that she died seized of a residence property on Eleventh avenue and another residence property on Ninth avenue, and also possessed of certain personal property. It does not appear from what source the personal property came which she possessed at the time of her death, although it is stated by counsel representing the heirs of William Ansel, deceased, that this personal property all came from her deceased husband. It appears that her husband died intestate in 1907, and that the Eleventh avenue property came to her by descent from her deceased husband, together with certain personal property; that the Ninth avenue property came to her by purchase after the death of her husband. It is clear that under the statutes of this state governing descents and distribution, that this estate must be divided into two parts which pass in different lines of descent. (Section 8577, General Code.)

The real estate on Eleventh avenue which came to her by descent from her deceased husband goes, one-half to the brothers and sisters of the whole blood of her deceased husband or their representatives, and the other half to the brothers and sisters of Minerva Ansel of the half blood or their personal representatives, there being, it appears, no brothers and sisters or their representatives of the whole blood of Minerva Ansel. The same is true as to any personal property of which she may have died possessed which came to her directly from her deceased husband. The half blood of John W. Ansel will not inherit as there is a sister of the whole blood living, and representatives of another brother and sister of the whole blood (*Stembel v. Martin*, 50 O. S., 475). As I have indicated, it does not appear from what source her personal estate is derived. In so far as it came directly from her husband, it passes one-half to her brothers and sisters or their representatives, and one-half to the brothers and sisters of the whole blood of John W. Ansel or their repre-

sentatives. In so far as she possessed personal property which did not come directly from her husband, as for example rents derived from her real estate or other personal property which she might have acquired by purchase after the decease of her husband, such personal property would pass to her heirs, in this case to her sister of the half blood and the representatives of another sister. So much for the course of descent.

Coming then to the question of the payment of the debts of the estate. In the first place, I am of opinion that the parties who take the two pieces of real estate take it *cum onore* as to the mortgages existing upon these two pieces of real estate. Where lands of a decedent descend subject to a mortgage created by the decedent, his personal estate is primarily liable for the discharge of the lien and the heirs are entitled to have the property exonerated from the lien by application of the personal estate to its payment. But in this case, as I understand it, the personal property possessed by her will not pay all of the other debts that are unsecured and that after the application of her personal property to the payment of the other debts of the estate, there will be still a considerable amount of indebtedness which will have to be paid from the proceeds of the real estate. All of the personal property, except that which can be directly traced to her husband, should be applied first to the payment of the general debts of her estate. The balance of the indebtedness must be paid from the proceeds of the sale of the real estate and the specific personalty which came by descent from her husband. The two pieces of real estate should be sold, as well as the personal property. From the proceeds of the sale of the Eleventh avenue property the mortgage on that property should be paid. From the proceeds of the sale of the Ninth avenue property the mortgage on that property should be paid. The balance remaining after deducting the mortgage from the selling price of the Ninth avenue property will go to her half sisters and the representatives of the deceased half sister. The balance remaining after deducting the mortgage from the selling price of the Eleventh avenue property will go, one-half to her half sister and the representatives of the deceased half sister, and the other

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half will go to the full sister of John W. Ansel and the representatives of the deceased full brother and sister *per stirpes*. The personalty which came to her directly from her husband should be divided into two equal parts, one-half going to the half sister of Minerva Ansel and the representatives of the deceased half sister, and the other half to the full sister of John W. Ansel and the representatives of the deceased full brother and sister *per stirpes*. After the application to the payment of the debts of her estate, exclusive of the mortgage debts, of whatever personal property she possessed at her death, except that which came directly from her husband, the remaining portion of the debt will be paid out of the property going to the sister of John W. Ansel and the representatives of the deceased full brother and sister and the property going to the half sister of Minerva Ansel and the representatives of the deceased half sister, in proportion to the value of the assets of the estates respectively, thus passing in different line of descent. In other words, add together the balance of the selling price of the Ninth avenue property after satisfaction of the mortgage and the half of the selling price of the Eleventh avenue property after deducting the mortgage, and one-half of the selling price of the personal property coming directly from John W. Ansel, and this will be the estate passing to the half sister and representatives of the deceased half sister of Minerva W. Ansel. Add together one-half of the selling price of the Eleventh avenue property after deducting the mortgage, and one-half of the proceeds from the sale of the personal property coming directly from John W. Ansel, and this will be the estate passing to the sister of the full blood and representatives of the brother and sister of the full blood of John W. Ansel. The debt remaining after application of her personal estate will be paid out of these two estates in proportion to their value or amount, and distribution made to those entitled.

Counsel for the heirs of John W. Ansel say that they have been unable to find any specific authority for the marshaling of such an estate as this, and I have been unable to find any, but upon principle this is in my opinion the proper method of

marshaling the assets and paying the debts of this estate. I can not agree with counsel for the heirs of John W. Ansel in their contention that the Ninth avenue property must be applied to the satisfaction of the entire indebtedness of the estate. The heirs of John W. Ansel have no equities, in my opinion, superior to those of the heirs of Minerva Ansel. The property all belonged to her during her life absolutely, and was subject to disposal by her in any manner that she saw fit. Those who dealt with her and extended credit to her had as much right to rely upon her ownership of the Eleventh avenue property as upon her ownership of the Ninth avenue property. As the law formerly stood, it would all have descended to her heirs to the exclusion of the heirs of John W. Ansel. The only effect of the statute was to pass one-half of such property to the heirs of John W. Ansel and one-half to her heirs, where before, the entire property would have passed to her heirs. But they have no equities on that account superior to her heirs. This was the conclusion arrived at by Judge Ferris in a case reported in 7th N. P. at page 185, holding that in such a case as this the brothers and sisters of the deceased husband must contribute to the payment of the debts of her estate in proportion to the value which the property coming to them bears to the whole estate.

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PROCEEDINGS FOR INCORPORATION OF A VILLAGE.

Common Pleas Court of Cuyahoga County.

E. S. LIBBY ET AL V. HOSEA PAUL, COUNTY RECORDER OF
CUYAHOGA COUNTY.

Decided, February 9, 1915.

*Villages—Dual Method Provided for Incorporation of—Failure to Give
Notice of Election for Full Statutory Time—Transcript Filed with
the Recorder—Limits of the Corporation and Whether Reasonable.*

1. The two methods provided under the laws of Ohio for the incorporation of villages are not exclusive each of the other, but are cumulative. Either method may be pursued as to allotted or platted lands, but as to unplatted lands Sections 3526-3531 alone apply.
2. Failure to publish notice of an election as to a proposed incorporation for the full ten days required by statute will be treated as an irregularity only, where there is no showing that the result of the vote would have been in any way changed had publication been made for the full time.
3. Proof that persons who signed the petition for incorporation are electors, and reside within the limits of the proposed incorporation, and a majority of them are freeholders, need not be set out in the transcript filed with the recorder.
4. A proposed incorporation of three thousand acres is not unreasonably large, where there is a population of six hundred, and the allotments cover six hundred acres, and the character of the property is rapidly changing; nor is ground afforded for refusing a prayer for incorporation because some of those owning farm lands will be inconvenienced by reason of the fact that they do their shopping in a neighboring village and their social relations are maintained there.

A. W. Lamson, for plaintiff.

Frederick W. Green, contra.

ESTEP, J.

This is an action to enjoin the recorder of Cuyahoga county, Ohio, from making a record of the proceedings of the board of township trustees with reference to the incorporation of said village of Maple Heights, and from certifying the transcript thereof to the secretary of the state of Ohio; and that said de-

pendant be ordered and adjudged to expunge from the records of his said office so much of said proceedings as he has heretofore made, before the expiration of ten days from the filing of said record and said proceedings with him, and for such other relief as may be just and equitable.

The following objections have been urged by plaintiffs to the proceedings relating to said incorporation:

First. It is urged that the trustees of the township were without jurisdiction to entertain the proceedings had before them.

Second. Because ten days notice of the election held, as required by the General Code, Section 3527, was not given according to law.

Third. The transcript filed with the recorder does not show that proper proof was presented to the board of trustees, prior to the calling of the election, that said petition was signed by not less than thirty electors.

Fourth. That the limits of the proposed corporation are unreasonably large, and that it is not right, just or equitable that the prayer of the petition presented to the said township trustees be granted.

I will consider these objections in the order presented.

1. It appears that the first two objections have been settled by our own court of appeals in the case of *Edwin Scrivens v. Hosea Paul, Recorder*, being opinion No. 582, rendered June 22, 1914. In that case it appeared that the territory involved consisted of six thousand acres of land. Sixty acres had been laid off into lots and surveyed and platted by an engineer, the map thereof being recorded. It was claimed that this fact brought the proceedings under General Code, Sections 3517-3525 inclusive, which vests the jurisdiction to erect a village in the county commissioners. In the present action the territory consists of three thousand or more acres, and of this amount some six hundred acres is allotted property; and hence the same objection is made in this action as to the jurisdiction of the trustees to erect a village as was made in the Scrivens case. Winch, J., in regard to this question, says:

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“The jurisdiction of the county commissioners under these sections has existed for many years, and is limited to territory which has been laid off into village lots, etc., although Section 3519 provides that the description of the territory embraced in the proposed corporation may contain adjacent territory not laid off into lots.

“In 1896 a supplementary law was passed providing for the incorporation into a village of ‘any territory or portion thereof’ by proceedings before the trustees of the township in which the territory is located, and requiring an election upon the matter to be held. This law is now found as General Code, Sections 3526 and 3531 inclusive, and was complied with by the inhabitants of the territory now incorporated as the village of Brook Park. Thus two methods of incorporation of villages are provided by law, and we hold that they are cumulative and not exclusive the one of the other. Either method may be pursued as to allotted or platted lands, but as to unplatted lands it seems that the law of 1896 alone applies.”

2. In regard to the question of the notice published in the newspaper: It appears that notices of the election were posted as required by statute, but that the notice published in the *Cleveland Leader* was not published the full ten days, as provided in the statute.

It appears from the evidence that 181 votes were polled at the election, and of this number 122 voted in favor of the incorporation of Maple Heights village, and 59 voted against the incorporation. It does not appear but the full vote of this territory was counted, and no showing has been made that the majority of 63 would have been in any way cut down if the full ten days’ publication had been made. No showing has been made relating to the insufficiency of the notice of the election throughout this territory. In the case of *Fike v. State of Ohio*, 4 C.C.(N.S.), 81, the second syllabus is as follows:

“Failure to publish for a full period of ten days the mayor’s proclamation of a special election to be held under Section 4363-20a, Revised Statutes, etc. (commonly called the Beal local option election law) is not fatal to the validity of the election, where the election was otherwise regularly held. Knowledge of its approach was general throughout the municipality, and a comparatively full vote was cast, and no attempt was made to

deceive or mislead any one, and it does not appear that any elector was either without knowledge thereof, kept from voting, or failed to vote on account of the failure to give ten days' notice. Publication of notice for ten days, under such circumstances, is not jurisdictional, and failure to publish it for the full period is a mere irregularity which does not invalidate the election."

There is no charge of fraud made in regard to the election in this proceeding, and no proof is offered which tends to show that there was not the fullest publicity, in the proposed incorporation, of such election; and there is no testimony tending to show that any elector in the proposed incorporation was prevented from voting on account of the lack of a few days' notice of the time required by law.

The language used by Winch, J., in the Scrivens case, is equally applicable here:

"In this case the will of the people was clearly and decisively expressed at the polls, and it should not be thwarted by the courts. Rather is it the duty of the courts to sustain the will of the people on all occasions, unless that will plainly undertakes to override some provision of the Constitution or laws duly enacted by the people's representatives."

See also language of Judge Brinkerhoff in 15 O. S., page 537.

The court of appeals, in the Scrivens case, having held the lack of full ten days' notice, under the facts in that case, to be a mere irregularity, I am disposed to follow the ruling and apply it in this case on practically the same state of facts.

3. In regard to the sufficiency of the transcript filed with the recorder—the plaintiffs claim that this transcript should contain the proof offered when the trustees received the petition relating to the proposed incorporation, that the persons who signed it are electors, and reside within the limits of the proposed incorporation, and that a majority of them are freeholders. This proof is referred to in General Code, Section 3527. General Code, Section 3530, refers to the transcript and record, and provides that the trustees shall make a certified transcript of the journal entries of all their proceedings, etc.

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The resolution contained in the transcript of the proceedings of the special meeting of the trustees of Bedford township, upon the 11th day of December, 1914, recites that there was presented proper proof that the persons who signed said petition are electors residing within the limits of the proposed incorporation, and that a majority of said signers are freeholders within the limits of said proposed incorporation.

It appears to me that we must look to General Code, Section 3530, in order to ascertain the proceedings which are to be contained in the transcript. When this section provides for a transcript of the journal entries of all their proceedings, in my opinion it does not mean that the testimony or proof provided for in Section 3527 must be written out and journalized. The affidavit of E. J. Andres relating to the freeholders, etc., who signed the petition, is, in my opinion, surplusage, and may be disregarded, as it is not legitimately and properly a matter of record. *Smith v. Board of Education*, 27 O. S., 44.

The truth of the recitals contained in the resolutions relating to this matter will be presumed.

The principle is well stated in the case of *Lessee of Coombs and Ewing v. Lane*, 4 O. S., 112. In the first syllabus, it is laid down as follows:

“In respect to official acts, the law will presume all to be rightfully done, unless the circumstances of the case overturn this presumption; and, consequently, acts done which presuppose the existence of other acts to make them legally operative, are presumptive proof of the latter.” See *Dalrymple v. State of Ohio*, 5 O.C.(N.S.), 185.

The transcript before the court appears, with slight omissions, to be a full and complete transcript as provided by General Code, Section 3530, and I am of the opinion that the proof provided for in General Code, Section 3527, need not be set out in the transcript for the reasons above set forth.

4. I will now consider the objection made as to the size of the territory, and the question as to whether it is right, just and equitable that the prayer of the petition presented to the said township trustees should be granted.

Upon the question as to this territory being unreasonably large, I do not understand that this objection has been urged to any extent. In the incorporation of any village, which contains allotted property and surrounding farm property, it may be said, as was said by Judge Neff in *Hall v. Siegrist*, 13 O. D., 58:

"If we are remitted to the consideration of the question as to whether it can be embodied into a compact municipality, it is perfectly apparent that for many years at least such a condition of things would not exist."

There are ten or more allotments in this territory, composing some six hundred acres and having a population of approximately six hundred. The character of the property is rapidly changing, and there is substantially nothing before the court which would justify a holding that this territory is unreasonably large.

Testimony has been offered tending to show that some of those owning farm lands in this territory will be inconvenienced by the incorporation of this village; that they do most, if not all, of their shopping in Bedford, and their children attend school here, and that all their social relations are maintained in Bedford.

In the case of *Hall v. Siegrist*, *supra*, it was urged that the incorporation would increase the taxes of those objecting to the proceedings. Judge Neff held that there being no evidence offered to show any inequality in the proposed taxation, any increase of taxes would be offset by the advantage resulting from proposed improvements, police protection, etc.

He also cites authority to the effect that the disarrangement of school and election districts is no ground for refusing to incorporate a village. In the case of *Smithfield Borough*, 23 Pa. Co. Ct. Rep., 583, it is laid down in the syllabus that:

"In determining whether a borough should be incorporated, the court will consider the subject broadly, having in view the highest interests of all concerned, and not only the present situation, but the needs and growth of the locality in the future."

The showing made by plaintiffs of inconvenience to them in the creation of this incorporated village is certainly not suffi-

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cient to justify the court in refusing to sustain the proceedings. There is not sufficient proof before the court to show that said incorporation is not right, just and equitable.

Upon a careful examination of all the objections and errors urged to their proceedings for the incorporation of the village of Maple Heights, I find no good and sufficient reason for granting the prayer of the petition, and the said petition is therefore dismissed.

**LIABILITY FOR SERVICES OF ATTORNEYS IN DEFENDING
A PUBLIC BOARD.**

Common Pleas Court of Hamilton County.

BOARD OF EDUCATION, BY ALFRED BETTMAN, CITY SOLICITOR,
ET AL V. BOARD OF EDUCATION ET AL.*

Decided, November, 1914.

Office and Officer—Employment of Outside Counsel to Defend a Public Board—Good Faith—Officers Not Liable Under a Contract for Such Services, When.

When the legally constituted counsel of a public board refuse to resist an action in which the board is vitally interested and special counsel are employed to make the necessary defense, the board, rather than its members in their individual capacity, will be held liable for the fees of such counsel, particularly where no bad faith is shown and the members of the board serve without compensation.

CALDWELL, J.

This is a suit to enjoin the payment of fees that are claimed to be due defendants, Simeon M. Johnson and William Thorn-dyke, for services alleged to have been rendered under a contract with the old school board of Cincinnati.

At the hearing of this case, there was little or no conflict in the evidence. It is admitted that the board of education of the city of Cincinnati did, on December 29, 1913, pass a resolution calling upon the then city solicitor, Alfred Bettman, to appear

*Affirmed, *Board of Education v. Board of Education*, 22 C.C.(N.S.),—.

before it and state whether or not he would resist the application of James G. Fisk to the Court of Appeals of Hamilton County, Ohio, for a writ of mandamus against that board, and make a defense for the board on the ground that the so-called Jung small school board law (103 O. L., 225) was unconstitutional and void in that it contravenes the provisions of Article VI, Section 3, of the Ohio Constitution, requiring that:

“Each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and the organization of the district board of education,”

and that it also contravenes the provisions of Article II, Section 26, of the Ohio Constitution, requiring that:

“All laws of a general nature, shall have a uniform operation throughout the state.”

It is true that the Jung law did postpone any possible referendum on the question of the number of members of the board of education for a period of two years, and that no election of members could possibly be had under the Jung law for a period of four years. It is also true that the law did not apply to all cities alike, but created classes based on population. However, the Supreme Court of Ohio held in the case of *State, ex rel Samuel Ach et al, v. J. Corliss Evans et al*, that the law was valid and constitutional and did not contravene either of these constitutional provisions.

The evidence discloses that Mr. Bettman complied with the request of the board of education to appear before it, but refused to resist the application of Mr. Fisk upon the ground of the unconstitutionality of the Jung law, and in refusing, he used this language:

“I am not a fit person to present that defense because I am on record as believing the statute to be constitutional, and I believe it to be constitutional and will not be willing in said suit to raise and argue the defense of the unconstitutionality of the small school board statute.”

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Mr. Fisk's application for a writ of mandamus was based upon a refusal of the board to canvass the vote for members of the board of education, a duty imposed upon the board by Section 5111 of the General Code. Said Solicitor Bettman did offer, however, to resist the Fisk application on the ground that the duty of canvassing the vote of the board of education was not imposed on boards of education in registration cities under Section 5115 of the General Code. The election at which Mr. Fisk received such number of votes as entitled him to be declared elected to the board of education was held under the provisions of the Jung law. Therefore, if that law was unconstitutional in the particulars claimed, an answer setting up such invalidity would be a complete defense for the refusal of the board to canvass votes cast at such election and would necessarily raise the question of the constitutionality of the act.

It is within the knowledge of the court that the question of the invalidity of the Jung law had been receiving public attention for months prior to the action of the board. The old board of education was about to go out of office and the question had not been determined. Conditions would naturally be unsettled until the question was determined. The city solicitor, Alfred Bettman, who admitted on the stand that he had participated in the drafting of the Jung law, and who had given an opinion to the effect that the law was valid, refused to urge the invalidity of the act. His successor in office, Hon. Walter Schoenle, followed Mr. Bettman's opinion as to the validity of the act, and finally succeeded in establishing its validity in the Supreme Court of Ohio.

Immediately after Mr. Bettman's refusal to present the question of the invalidity of the act, the board of education adopted the following resolution:

"WHEREAS, In the judgment of this board, the so-called Jung small school board law, as enacted by the last General Assembly of Ohio (Vol. 103, Ohio Laws, page 275), is unconstitutional and void, in that it contravenes the provision of Article VI, Section 2, that

"Each school district embraced wholly or in part within any city shall have the power, by referendum vote, to determine for itself the number of members and the organization of the district board of education."

And also the provision of Article II, Section 26, that

"All laws of a general nature shall have uniform operation throughout the state;" and

"WHEREAS, It is the sense of this board that the validity of said law, or its invalidity, should be established by the decision of a court of competent jurisdiction; and

"WHEREAS, James G. Fisk, claiming to have been elected a member of the board of education at the pretended school election, held Tuesday, November 4, 1913, in the school district of the city of Cincinnati, under the provision of said law, has filed in the court of appeals of this county, a petition in mandamus to compel this board of education to canvass the vote of said pretended election, to enter the result thereof on its records, and to declare the said James G. Fisk duly elected to the office of member of this board of education for a term of two years; and

"WHEREAS, Litigation of a similar nature, affecting the validity of said small school board law, and a chaotic condition of affairs generally, are threatened, according to the public press; and

"WHEREAS, The city solicitor has rendered an opinion in writing to this board, holding said Jung small school board law valid and constitutional, and has also declined to resist the application for a writ of mandamus against this board in the proceedings instituted by James G. Fisk in the court of appeals, on the ground that said Jung small school board law is unconstitutional and void in the particulars above set forth; now, therefore be it

"*Resolved*, By the board of education of the school district of the city of Cincinnati that Simeon M. Johnson and William Thorndyke, attorneys-at-law, be now retained to represent this board as special counsel in the mandamus proceedings pending in the court of appeals, wherein James G. Fisk is relator, and the board of education of the school district of the city of Cincinnati is defendant; and the said Simeon M. Johnson and William Thorndyke are hereby directed and authorized to enter the appearance of this board in said proceedings, waive the issuance of the alternative writ or any other process in said proceedings, to take such steps as they may deem advisable in order to obtain,

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without delay, the decision of the proper court upon the constitutionality of the said Jung small school board bill, and also to assist any other legal counsel of this board of education of the school district of the city of Cincinnati in any suit or proceeding which it now or may be hereafter instituted, wherein said board is a party plaintiff or defendant, involving the constitutionality or validity of the above law or any question thereunder; and be it further

“Resolved, That a retainer of \$1,500 each be paid to said Simeon M. Johnson and William Thorndyke for the services herein contracted for, which sum shall be in full for all of said services, and that an additional sum of \$300 be paid to them for expenses, including printing, court costs, briefs, records and incidentals, any unexpended balance to be repaid this board; and be it further

“Resolved, That the clerk be instructed to certify that the sum of thirty-three hundred (\$3,300) dollars of the balance in the contingent fund is available for the payment of said retainer fees and expenses, said sum being in the treasury to the credit of said contingent fund, and the said sum of thirty-three hundred (\$3,300) dollars is hereby appropriated to the payment of said retainer fees and expenses.

“DECEMBER 29, 1913.

“I hereby certify that the money required for the payment of attorney’s fees and the court costs provided for in the within resolution, viz: \$3,300, is in the treasury to the credit of the contingent fund, and not appropriated for any other purpose.

“WM. GRAUTMAN, Clerk.”

The sole question before the court in this case is, did the board of education have any authority in law to pass the resolution employing Messrs. Thorndyke and Johnson?

The undisputed testimony shows that the services rendered were reasonably worth the amount the resolution authorizes to be paid; that it was necessary to defend not only the Fisk application, but other proceedings as well under the resolution of employment above set forth in full, and under a further resolution requiring Messrs. Johnson and Thorndyke to defend other suits growing out of the resolution employing them. The suits in question are: No. 292, on the docket of the Court of Appeals of Hamilton County, a proceeding in mandamus; No. 301, on the docket of the Court of Appeals of Hamilton County, Ohio, a

proceeding in quo warranto; No. 55832, on the docket of the Superior Court of the City of Cincinnati, a proceeding in injunction; No. 155671, on the docket of the Court of Common Pleas of Hamilton County, Ohio, also a proceeding in injunction; No. 14341, on the docket of the Supreme Court of Ohio, a proceeding in mandamus; No. 14466, on the docket of the Supreme Court of Ohio, a proceeding in quo warranto. There can be no question that all of these suits grew out of the effort of the board of education to test the validity of the Jung law and to determine the constitutionality thereof. An examination of the briefs filed discloses that counsel on both sides exercised their utmost diligence in making the proper presentation of their respective claims to the several courts in which they appeared.

The Supreme Court finally disposed of the controversy in the case of *State of Ohio, on the relation of Samuel Ach et al, v. J. Corliss Evans et al*, holding the Jung law valid in all respects.

There has been no question raised of the good faith of the old or large board in seeking an orderly presentation of their side of the controversy to the proper tribunal. An examination of the record and agreed statement of facts in the Supreme Court proceedings disclose beyond question that there was reasonable ground for the large board of education to question the validity of the act. It was of great public importance that the question of the constitutionality of the act be determined. The court may say that the board of education properly awaited the verdict of the people on the question of a large or small council before announcing an intention of questioning the validity of the small school board law. The Jung law prohibited a referendum for two years and an election under it for two additional years. A careful perusal of the briefs of counsel on both sides fully warrant the conclusion that the questions involved affecting nearly every large school district of the state, should have been submitted to the highest tribunal of the state for decision. It appears from the evidence that the Supreme Court ordered from the bench during oral argument that special attention be given the referendum question by counsel on both sides. It also appears from the evidence that during the preliminary hearing

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in the court of appeals on the Fisk suit that the city solicitor, Mr. Bettman, objected to Messrs. Johnson and Thorndyke appearing on behalf of the board of education, or filing an answer for said board, but that they were permitted by the court so to appear and file their answer, after the court had been informed by counsel for said board of education that they represented said board of education and read the resolutions of employment to the court. Therefore, it is the opinion of the court that the court of appeals recognized Johnson and Thorndyke as the counsel representing the board of education; so also is it the opinion of the court that when the Supreme Court permitted counsel to appear and argue the case in court, and file briefs in the case, they recognized them as counsel for the old board of education, for the litigation in the Supreme Court was in fact to determine the constitutionality of the act in question, and was to all intents and purposes a suit against the old board of education, enjoining the members, or a number of them, from acting as such.

The same question as to the right of public officers to employ other attorneys than the legally constituted counsel of such officers, has been before the courts of this state before. And it has been uniformly been held that where the legally constituted counsel refuses or is adversely interested, such employment is legal and proper.

In *State, ex rel, v. Commissioners*, 8 N.P.(N.S.), 281, Judge Hunt held:

“In the absence of any statutory provision, either express or implied, other persons can not be legally employed and paid out of the public treasury to perform the duties of an officer provided by law, *unless such officer refuses to act or becomes adversely interested.*”

In a case very similar to the one at bar, *Caldwell v. Marvin et al*, 8 N.P.(N.S.), 390, Judge Hunt held again:

“It is claimed in this case that no valid contract could have been made by the board of education for services of attorneys

in a quo warranto proceeding. The city solicitor, under Section 3977, was the legally constituted attorney or legal counsel of the board, and until he refused or failed to act, no additional legal counsel could be employed. When, however, he elected to act for the *de facto* board, and not for the board *de jure*, other counsel was necessary. The ordinary and necessary method of conducting a legal proceeding is with the assistance of legal counsel. If the right of a board of education to exercise some single power was challenged in a quo warranto proceeding, there would be no question of the implied right to employ counsel in the absence of legally constituted counsel, or upon the failure or refusal of such counsel to act. Why should the rule be different where the right to exercise any power, whatever, is questioned and proper to be established? The public is interested in having its legally elected officers perform their duties, even though less interested than in having such duties performed."

This decision disposes of the contention that Messrs. Johnson and Thorndyke were acting in the quo warranto proceedings in the Supreme Court for individuals and not for the board of education.

And the decision of Judge James M. Smith in *State, ex rel Matthews, v. Boyden, Auditor*, 18 C. C., 282, also sustains the right of the board of education to be represented in a case wherein its rights are vitally affected, even though it is not a formal party. However, in the case at bar, Messrs. Thorndyke and Johnson obviously are appearing for the defendant, the board of education, Mr. Schoenle not pretending to represent any other than the plaintiff.

It appears from the pleadings that when the personnel of the board changed, all existing contracts with Messrs. Johnson and Thorndyke were rescinded. Counsel for plaintiff did not touch upon this point in argument at all. And from the contract of employment it is evident it can not be maintained. The contract was for a retainer due and payable immediately, but which was not drawn by agreement of Messrs. Johnson and Thorndyke with Solicitor Bettman, that a full opportunity might be had to test the right of the board of education to pass the resolution of employment.

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The services were rendered as contracted for, and the only question that arises is, Shall they be paid for by the board of education, or by the individual members of that board who were defendants in the quo warranto proceedings in the Supreme Court? The city solicitor urges that since his predecessor gave an opinion holding the law valid, the board had no right to question its validity further, nor to employ counsel to do so. The opinion of the court in *Kloeb, Auditor, v. Commissioners*, 4 C.C.(N.S.), 565. is exactly in point. In that case a county auditor questioned a charge made by a newspaper for advertising the tax rate. The commissioners ordered the charge paid, and, upon the auditor's refusal to do so, a proceeding in mandamus was instituted against him. The auditor's contention was denied in all the courts. He incurred the expense of attorney fees, however, in making his defense. He contended that he resisted payment in good faith, and, therefore, was entitled to have the expense paid by the county. The county commissioners denied his right to employ counsel, and he in turn instituted a mandamus proceeding against the commissioners to compel payment. The court held:

"A public officer is an agent of the public, and is governed as to the expenses which he may in good faith incur by the same rule that would be applicable to like acts of a private agent, or of a guardian or administrator, and is entitled to be reimbursed therefor."

Norris, Judge, says at page 573:

"Courts have held that public officers, not idly and stubbornly and in bad faith, but where reasons actually exist, or when to a prudent man, acting in good faith, and with that degree of circumspection and discretion that a prudent man under like circumstances would exercise, reasons appear to exist which are grounds for refusal to perform a ministerial act that otherwise would be a clear official duty, such public officers may make contest in the courts against the writ of mandamus to compel them to perform. It was so held in the cases which gave rise to plaintiff's claims in this action, or else those cases would never have been.

“Though the refusal of the officer to act may be in violation of official duty, which requires him to perform a ministerial obligation, the contest—the appeal to the courts, the submission of the reasons for refusal, to the law—is not of itself and in itself a transgression. It is the exercise of a right, and its exercise when in good faith, and based upon the honest judgment of a prudent man, properly discharging as seen to him, under the circumstances, the functions of his office and his duties, it is not improper and ought not draw upon him mulctary penalty, by imposing upon the individual the expense of the litigation.”

Clearly in the case at bar, bad faith can not be charged. It is in evidence that no salaries are paid members of the board of education, and that the expenses allowed them by law have always been waived, and the members of the board merely took what steps they could to insure a fair presentation of their side of this important public question, and in doing so, the court is of the opinion they performed an important public duty, and, as said by Judge Norris, in the case just cited, for so doing they ought not to draw mulctary penalties by having imposed upon them as individuals the expense of the litigation. In honesty as well as in law, the counsel they employed should be paid from the public funds, and the petition for injunction will be dismissed and judgment will be awarded the defendants for the amount claimed.

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**UNENFORCEABLE AGREEMENT RELATING TO THE DESCENT OF
PROPERTY TO ADOPTED CHILDREN.**

Common Pleas Court of Columbiana County.

ANNA MARY ARTER ET AL V. JOHN S. ULERY ET AL.*

Decided, January 29, 1912.

Adopting Parent Enters Into a Parol Agreement—Making Adopted Children His Heirs—Difficulty in Establishing the Contract—But if Proven it would Fall Within the Statute of Frauds.

A parol agreement entered into between a childless couple and the father of two children, whereby the childless couple undertook to adopt the children and make them their heirs and give them their property at death, is unenforcible, even if established by satisfactory evidence, where the estate which the children claim many years later under the agreement consists in part of realty and the agreement is not taken out of the statute of frauds by part performance or a showing of fraud.

MOORE, J.

This case has been submitted to the court upon the pleadings and the evidence. In the petition the plaintiffs claim that about November 29, 1887, James D. Ulery and Sarah Ulery, his wife, being childless, entered into a contract with Peter Schmidt, the father of plaintiffs, to adopt as their own, the said Anna Mary Schmidt, now Arter, as their own child, change her name to that of Ulery, and in every respect treat her as their own child, and agreed to make said Anna Mary Arter their heir and give her their property at their death. It is alleged that Peter Schmidt agreed to and did relinquish and give up all care, control, society and affection of his daughter to said James D. Ulery and wife, and signed a written consent for her adoption by said Ulery and wife. On June 15, 1889, the same agreement was made between the same parties relative to said Louisa

*Affirmed by the Circuit Court without opinion, October, 1912; judgment of the Circuit Court affirmed by the Supreme Court without opinion, *Arter v. Ulery et al*, November 17, 1914.

Schmidt, now Hanna, except that it is alleged that in the agreement relating to Louisa she was to be made joint heir with said Anna Mary; the property of the Ulerys to be divided one-half to Anna Mary, and one-half to Louisa. The first agreement as to Anna Mary was not set aside or abrogated.

Although the first agreement was that Anna Mary was to have all of the property at the death of the Ulerys, it is alleged that the Ulerys agreed in 1889 to give one-half of what they had agreed to give to Anna Mary to Louisa. It is alleged that Peter Schmidt and his two daughters fully complied with the alleged agreements; the two girls were taken by the Ulerys and lived with and were introduced and known as Ulery's daughters, and probably married under the name of Ulery. Mrs. Ulery did give her property by will to the two girls, amounting to, as the evidence shows, \$12,000. The real and personal estate of James D. Ulery is set out in the petition, and it is claimed under the contract by the plaintiffs, and specific performance is prayed for. These contracts were verbal. The evidence shows that in 1883 the mother of plaintiffs died at Alliance, Ohio, leaving surviving her, her husband, Peter Schmidt, and five small children, among whom were the plaintiffs. Peter Schmidt was a poor man, and his family of children soon scattered, one to Columbiana, one to Salem, and Anna Mary to Mangus, and the other two probably remained with Peter. Mention was made of sending somebody, probably Anna Mary, to the children's home, but it was not done. I have no doubt but that friends of Peter were looking up some suitable place for all of the children, and when an opportunity came to place them at Ulerys they were there permitted to go, and it was for the best interest of the children that they should go there. Peter then knew but little, if any, English. Karshner and Mangus acted as sort of interpreters for him, and he now, after twenty-seven years, undertakes to tell us, in his broken way, the alleged contract, and he is the only living witness thereto.

The evidence shows that Mrs. Ulery first came for, contracted about, and took away from Alliance Anna Mary, and James Ulery was not along; then in the summer Karshner, now dead, and Peter Schmidt went down to Ulerys and there some talk

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was had; James D. Ulery and his wife were both present, Karshner interpreting to Peter what was said. Peter said James D. Ulery spoke of adopting Anna Mary at that time; the answer and consent for adoption was signed by Peter, but not much said about the property. He says that as it was interpreted to him, James D. and Mrs. Ulery said when they were dead their property would go to Mary. Then a year or so later, in 1889, they came to Alliance, said Louisa would be nice company for Anna Mary, and they would adopt Louisa on same condition as Anna Mary, and Louisa was taken by Ulerys then or a short time later. The petition alleges that Louisa was to have one-half, but the testimony of Peter says she was to be adopted on the same condition as Anna Mary. He says he signed a consent for adoption of Louisa at that time. The evidence shows that he did sign both consents, but neither James Ulery or Mrs. Ulery ever signed any petition for adoption of either of the girls, and the fact that the petitions were never signed seems to bear out the theory that James D. Ulery had not agreed to sign the papers. His wife may have been willing to do so, but evidently James D. refused. I can imagine some reasons why he was not making the contract, but was willing his wife might (so far as she was concerned) do so. Peter says he never saw James D. Ulery except at the two farms. Mangus says that when Mrs. Ulery came for Anna Mary, the conversation was that she would take Anna Mary, and if she liked her she would adopt her as her own daughter, but James D. was not there. Peter was satisfied, and Mrs. Ulery that day took Anna Mary away from the home of Mr. Mangus. Mr. Mangus says that Mrs. Ulery said she did all the business, and if they liked her they would adopt her (meaning Anna Mary). It is clear that the girls were good girls, well reared, behaved as children should toward Mr. and Mrs. Ulery, and gave them their respect and services, living with Ulerys as their own children, under the Ulery name, and as members of the family of Mr. and Mrs. Ulery.

Mrs. Ulery died January 24, 1904, and James D. Ulery died July 13, 1911, and this suit was begun August 7, 1911. There is no evidence to show that Peter Schmidt or his daughters,

during all the years mentioned, ever sought to ascertain if any adoption had been made on the records of the courts. Both girls were married when they were about nineteen years of age. Now, without deciding that there was a contract or contracts such as is alleged, I am going to assume that the evidence sustains both contracts. If the case rested entirely upon the existence of the alleged contracts I might have some doubt about the same being proven by that clearness required by law in order for the court to decree specific performance. Such claims made after so many years have gone by, and when all the witnesses thereto, but one, are dead, and that one, of course, interested, for his daughters' sake, are to be scrutinized carefully by courts, before taking property out of its natural and sending it into an unnatural course.

However, as I have said, let us assume the contracts as alleged are proven. And let us overlook the attempt by the second contract to give to Louisa one-half of what had already been contracted away to Anna Mary. It is claimed that these contracts should be specifically performed because of fraud of James D. Ulery, but the claimed fraud consists only in the fact that James D. Ulery did not perform his contract, did not adopt the two girls according to the forms of law so as to make them his heirs at law.

This is not the kind of fraud spoken of in the case cited in 33 O. S., pages 35 to 52. In that case the frauds spoken of are those of one person agreeing to buy for another with the other's money and taking title in his own name, and the court says on page 50:

"Fraud is so multifarious in its forms that it would be dangerous to attempt a definition of the powers of a court of equity in such cases. Each case depends upon its own facts and circumstances. It may be said, however, that in all such actions, the action is brought, not on the verbal agreement, but because of the bad faith, fraud, and injury in refusing to perform it. As in the case of a verbal contract to sell land, equity only intervenes when it would be a fraud and injury not to enforce it."

And yet equity will not decree specific performance of a verbal contract relating to land, where the part performance

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is only the payment of the purchase price in money or in service. 38 O. S., 331; 37 O. S., 402.

In the case of *Crabill v. Marsh*, 38 O. S., 331, in the opinion on pages 338 and 339, it is said:

“And a mere refusal to perform a parol agreement, void under the statute of frauds, is in no case fraud, either in law or equity. *Wheeler v. Reynolds*, 66 N. Y., 227.”

In the case at bar the action is upon the alleged agreements, not upon fraud, if any there was. If there was any fraud it simply consisted of the refusal or neglect of James D. Ulery to adopt said plaintiffs in the forms required by law to make them his heirs at law, and such refusal or neglect is insufficient to constitute fraud in such cases. The only part performance in this case was the surrender of the plaintiffs by their father to the Ulerys, and the plaintiffs residing with and being reared by Ulerys as their children and members of their family, and the services and affection by the plaintiffs for the Ulerys. In my opinion that is not enough.

In *Shahan v. Swan*, 48 O. S., 24, the court says:

“Where a parol agreement to convey an interest in land is attempted to be withdrawn from the operation of the statute of frauds, by proof of its part performance, the acts of part performance, to be sufficient for the purpose, must be, of themselves, clearly referable to some contract between the parties relating to the property in dispute.”

I fail to see where the acts of part performance claimed to be such in this case are clearly referable to any contract between Peter Schmidt and James D. Ulery relating to the property of James D. Ulery described in the petition. Those acts are just as well referable to a contract between Mrs. Ulery and Peter Schmidt, as to a contract for the rearing and educating of the plaintiffs by James D. Ulery:

On page 37 of the case of *Shahan v. Swan*, in 48 O. S., the court says this, speaking of the contract and to what it is referable:

“First. Then it seems evident that all that can be gathered from acts of part performance is the existence of some contract

in pursuance of which they were done, and the general character of the contract: and they can not, unless possibly in some very singular case, be themselves sufficient evidence of the particular contract alleged, because they can not, in themselves, show all the terms of the contract from which they flow."

They cite a large number of authorities to sustain that and then go on to say:

"Usually possession is the act of part performance relied on to take a case out of the statute of frauds; that, of course, always discloses the subject-matter to which it refers, and courts in discussing its sufficiency have no occasion to expressly declare that the act of part performance must refer to the subject-matter of the contract in dispute, and it is apparent that such qualification is always understood."

Now, these contracts were in parol, were verbal—no writing signed by James D. Ulery—and the contract is clearly within the statute of frauds, and there was no such acts of part performance or of fraud as takes the contracts out of the statute, in the opinion of the court.

Shahan v. Swan, *supra*, is a case about like the case at bar, with one exception, as I understand it. There was no law at that time authorizing adoption—see page 31—and in that case relief was denied.

Then, to strengthen and make clear the opinion of the Supreme Court in cases such as this, we have the case of *Swartz v. Steel et al*, in 8 C. C. R., page 154, where it was held as follows:

"C. entered into a verbal contract with S. to adopt and make her infant daughter his heir; in pursuance of the agreement the infant, two years old, was delivered to C., and the contract was faithfully performed, except that the statutory requirements for the adoption were delayed until the daughter became twenty years old, at which time the formal requirements of the statute were complied with in the probate court, and believed by the parties to be legally valid, and so treated by C. and S., her daughter, until their deaths.

"*Held*: That the writing and part performance under it, take the case out of the operations of the statute of fraud, and the daughter became the heir of C."

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That case was almost like the one at bar, except as I shall mention a little later, and, indeed, a stronger one, for the Carnahans admitted their agreement, and thought they had complied with it, and treated it as complied with, and yet the circuit court decision was reversed by the Supreme Court in the case of *Steel et al v. Swartz, Guardian, et al*, 55 O. S., 685, and the judgment and decision of the common pleas court was affirmed on the authority of *Shahan v. Swan*, 48 O. S., 25.

Now, I have read a very excellent brief, a very able brief I might denominate it, presented by counsel for plaintiffs. There is but one distinction that they present to me to which I have given very much consideration, and that is this: that my attention is called to the fact that the difference between the case of *Swartz v. Steel*, as reported in the 8th Circuit Court Report, has nothing in it saying that it was agreed that the property of the Carnahans should be given to the children; that all they agreed to do was to make her their heir; and then a case is cited in the brief, I think from Michigan, in which the judge there intimates that the contract not containing the words "and also to give the child the property," but only to make her their heir, was insufficient; that he intimates that if the contract had contained the words "and to give her their property," then the decision ought to have been otherwise in the Michigan case. It is not true of the *Shahan v. Swan* case. I find in the case of *Shahan v. Swan*, on page 31, these words:

"The contract provides generally that she shall be made the heir to Mr. Woodbridge and shall succeed to his property at his death."

So it does not make any difference what the circuit court said if that case did not have those words in it. *Shahan v. Swan* has those words in it, and that they (the Woodbridges) agreed, that they would take the child and make her their heir, and adopt her as their own, and that she should succeed to and have all the property of the Woodbridges at their death; and that contract was fully and completely performed by the Woodbridges and by their daughter, and yet the Supreme Court refused relief, and as I have said, they reversed the circuit court in the 8th Circuit Court case.

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I, therefore, feel that in view of the judgment of the Supreme Court in *Shahan v. Swan* and *Steel v. Swartz*, *Guardian*, I must deny plaintiffs, Anna Mary Arter and Louisa Hanna, the relief prayed for in this case. If the facts as developed in this case are sufficient to grant to plaintiffs the relief prayed for, I would very much prefer that it be granted by some higher court than this.

For the reasons given, the petition of the plaintiffs will be dismissed, and at their costs, and judgment is entered accordingly. Notice of appeal given and bond fixed at two hundred dollars.

ATTEMPT TO SECURE A DIVORCE IN FRAUD OF LAW.

Common Pleas Court of Hamilton County,
Division of Domestic Relations.

PEARL B. JONES v. FRED R. JONES.

Decided, June, 1915.

Divorce—Attempt to Secure by Obtaining Residence in Another State—Does Not Give Jurisdiction to Grant a Decree, When—Injunction Against Proceedings in the Courts of Another State.

Where one of the parties to a marriage contract becomes a resident of another state for the sole purpose of obtaining a divorce while so resident, and a few days after the requisite time as provided by statute files a suit for divorce in a court of said state, his residence so obtained is not *bona fide* and gives the courts of said state no jurisdiction, and an action so filed will be disregarded by the courts of this state.

Dickerson, Black & Dickerson, for plaintiff.

James G. Stewart, contra.

HOFFMAN (Charles W.), J.

On May 1st, 1915, the plaintiff filed her petition for divorce against the defendant. In addition to the causes for divorce alleged in the petition, plaintiff states that the defendant is a resident, and domiciled in the state of Ohio and that he has never had a residence in any other state, territory or place, but

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that defendant desiring to evade the laws of Ohio in relation to divorce and alimony, and subject the plaintiff to great expense, litigation and annoyance in the courts of Kentucky, has, within the year last past, falsely, wrongfully, and for the purpose of defrauding her and practicing a fraud upon the courts of Kentucky, and with the intent to evade the laws of Ohio, and in disregard of the rights of the plaintiff, pretended to have a residence in the city of Newport, Campbell county, Kentucky, and has on the 7th day of April, 1915, commenced an action in the Campbell County Circuit Court against the plaintiff for divorce.

On the application of the plaintiff the court granted a temporary restraining order, enjoining the defendant from taking further steps in the prosecution of his action in the Circuit Court of Campbell County, Kentucky, and from prosecuting any action against the plaintiff for divorce in any county, or in any state or country other than in the courts of the state of Ohio.

On May 3d the defendant filed a motion to modify the temporary restraining order by dissolving and vacating as much thereof as restrained him from taking any further steps in the progress of the action in the Campbell County Circuit Court of Kentucky, and from prosecuting any action against plaintiff for divorce in any court, in any state or country other than in the courts of the state of Ohio.

The motion came on for hearing and the parties adduced evidence by affidavit, depositions and oral testimony.

The court finds on the evidence adduced that the defendant was a resident of the state of Kentucky for the requisite time provided by statute for the filing of a petition for divorce in said state.

The court further finds, however, that the defendant within three days after the requisite time for residence, provided by the statute of Kentucky, filed his suit for divorce against the plaintiff in this cause, and that he became a resident of the state of Kentucky for the sole and express purpose of obtaining a divorce in said state.

It has been uniformly held, both by the federal courts and the courts of various states that when a resident of one state

goes to another state and takes up his residence there, and as soon as he is able to do so, files a suit for divorce, that the inference that he became a resident of such foreign state for the purpose, solely, of securing a divorce, is "violent, if not conclusive."

The court does not consider it necessary in this opinion to cite and comment on the many cases in which it is held that under facts similar to these in this case, the defendant's residence in a foreign state is not *bona fide*. We will mention but a few of the leading cases.

The case of *Streitwolf v. Streitwolf*, 181 U. S., page 179, is a case substantially analogous to the case at bar. A party had become a resident of the state of North Dakota, and as soon as he was able to do so filed a suit and obtained a divorce. In the meantime the wife had filed a petition in the court of New Jersey, praying for an injunction against the enforcement of the decree in North Dakota, and alleging that the domicile of both parties was in New Jersey. The injunction was granted and the cause finally reached the federal court where it was held that the decree in North Dakota was void for want of jurisdiction of the subject-matter, and of the wife as a party, and was procured by fraud and in contempt of the chancery court of New Jersey.

This decision affirmed the decree of the court of errors and appeal of the state of New Jersey, 58 N. J. Eq., 683.

The opinion in 181 U. S., 179, is as follows:

"This case must follow *Bell v. Bell*, 181 U. S., 175. The law of North Dakota requires a domicile in *good faith* of the libellant for ninety days as a pre-requisite to jurisdiction of a case of divorce. The facts in evidence warranted *and indeed required*, the finding that the husband had no *bona fide* domicile in the state of North Dakota, when he obtained a divorce there; and it is not pretended that the wife had an independent domicile in North Dakota, or was ever in that state. The court of that state therefore had no jurisdiction and the judgment is affirmed."

In the opinion in the case of *Dickinson v. Dickinson*, 167 Mass., 477, it is said:

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"It often has been held by this court, that the fact that a man abandons his wife and goes into another state, and there applies for a divorce soon after he is able to do so, warrants the inference that he goes there for that purpose. *Lyon v. Lyon*, 2 Gray, 367; *Chase v. Chase*, 6 Gray, 157-162. In *Smith v. Smith*, 13 Gray, 209, the presumption arising from such a fact is said by Chief Justice Shaw to be 'violent, if not conclusive.' See also *Sewall v. Sewall*, 122, Mass., 156."

In *Forest v. Forest*, 2nd Ed. (N. Y.), page 180, it is stated in the syllabus:

"Where both parties are residents in this state the injunction will issue to restrain one of them from instituting and carrying on proceedings in another state to obtain a divorce.

"So in case one of the parties changes his residence to another state, in order to institute a suit in the courts of that state.

"Where parties are resident in this state, and one of them removes to another state for the purpose of obtaining a divorce and remains there the length of time necessary to give its court jurisdiction, and obtains there a divorce, it will be of no effect in this state, and will be disregarded by our courts, as obtained in fraud of the law."

The cases cited by counsel for the defendant have reference more particularly to that which constitutes the domicile of a party: however, these cases are not applicable in all respects to the case at bar inasmuch as the court has found that the defendant in this case did not have a *bona fide* residence and domicile in the state of Kentucky and that he became a resident of the state of Kentucky for the sole purpose of obtaining a divorce, in disregard of the rights of the plaintiff who is a resident of the state of Ohio.

It is further stated by counsel for the defendant that the plaintiff can not be harmed by any action taken in the court of Kentucky, and that she will suffer no irreparable injury if she submits to the jurisdiction of the court of Kentucky. It may be said in this connection that the facts in this case disclose that previous to the filing of her suit for divorce in this state, and previous to the filing of the suit for divorce on the part of the

defendant in the state of Kentucky, that by order of the Court of Common Pleas of Franklin County, Ohio, a decree for alimony had been entered, wherein it is ordered that the defendant pay the plaintiff a stipulated sum of money per month. The order for alimony was obtained on the aggression of the husband and is now in full force and effect.

Should the plaintiff in this case be obliged to submit to the jurisdiction of the court of Campbell county, Kentucky, she would be bound by a decree of the Kentucky court and could not afterwards maintain an action in this state to recover any unpaid installments under her decree for alimony. The Supreme Court of this state has passed upon this matter in the case of *Gilbert v. Gilbert*, 83 O. S., 265, wherein it is held:

“Where a wife enters her appearance in a proceeding against her for divorce, in a court of another state, and asks for and is granted alimony in said proceedings, having set up therein her rights under a prior decree for alimony payable in installments in a suit for alimony alone in a court of this state, she is bound by the decree of the foreign court and can not afterwards maintain an action in this state to recover the unpaid installments under the prior decree.”

In conclusion the court finds that the defendant in this case is not a *bona fide* resident of the state of Kentucky; that his entering suit in said state for a divorce is *in fraudem legis* and must be disregarded. The motion to modify the temporary restraining order therefore is overruled.

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**REFUSAL BY CONSTABLE TO LEVY EXECUTION UNLESS
INDEMNIFIED.**

Common Pleas Court of Henry County.

STATE OF OHIO V. JAMES B. HUDSON ET AL.

Decided, June 2, 1915.

*Constable—Not Bound at His Peril—To Levy Execution Upon Property
Covered by Chattel Mortgage and in Possession of the Mortgagee.*

A constable is not bound at his peril to levy execution upon goods and chattels covered by a chattel mortgage which are in the possession of the mortgagee who claims to be the sole owner thereof, and his refusal so to levy, unless the execution creditor first indemnifies him, does not make such constable and his bondsmen liable in damages in an action by the state for the use of the execution creditor.

Charles R. McComb, for plaintiff.*Cahill & Mulcahy*, contra.

PRENTISS, J.

Plaintiff brings this action for the use of A. C. M. & Company, an execution creditor, to recover on the bond of J. B. H., a constable, and his sureties. J. B. H. was, on November 14, 1911, duly elected a constable for the township of Napoleon in the county of Henry and state of Ohio, who on November 17, duly qualified and gave his bond as such constable with two sureties for the sum of \$1,000. The bond was duly approved by the trustees and the constable entered upon his duties as such and continued to act during the period complained of.

On May 24, 1913, A. C. M. & Co. recovered a judgment against H. E. W. before a justice of the peace for the township above named for the sum of \$179.08 with interest from December 9, 1912, and costs amounting to \$4.50.

On May 26, 1913, at the instance of the counsel for A. C. M. & Co. an execution was duly issued upon the judgment and delivered to the constable, J. B. H., which commanded him to

make of the goods and chattels of H. E. W. the sum above mentioned.

It is claimed by the plaintiff that the constable neglected and refused to execute the process so issued to him; that there was then in his township personal property belonging to H. E. W., on which he might have levied sufficient to make the amount of the judgment and costs, and that because the constable so failed and neglected the execution creditor lost their debt, and judgment is asked against the constable and his bondsmen for the amount of the execution.

The defendants denied that the constable J. B. H. refused to execute the execution, also that there was personal property in Napoleon township belonging to H. E. W. exempt from execution, on which he might have levied sufficient to make the money called for by the execution, and claims that upon receipt of the execution the constable faithfully proceeded to execute it but found that H. E. W. had no goods or chattels to levy upon, and for want thereof the execution was returned unsatisfied.

The parties waived a jury trial and the case was submitted to the court upon these issues. The testimony shows that upon delivery of the execution to the constable he went as directed to the house of J. M. and upon inquiry found that property formerly belonging to H. E. W. was in the possession of J. M.; that J. M. claimed to be the owner of it by virtue of a chattel mortgage given by H. E. W. to J. M. some time prior for the sum of \$953.25. The constable afterwards went to the recorder's office and ascertained that the chattel mortgage, as claimed by J. M., was a matter of record. The next day J. M. served a written notice upon the constable advising the constable that he would hold the constable responsible for any interference therewith. The value of the property so held by J. M. amounted to about \$400.

The constable then advised the counsel for A. C. M. & Co. of these facts and informed him that he would levy upon the property and sell it if the execution creditor would first indemnify him against the claim of J. M., which was refused, and

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the constable, upon such refusal, declined to make the levy upon the property claimed by J. M., and he having found no other goods and chattels duly returned the execution on June 26, 1913, in which it is stated that no goods and chattels of H. E. W. were found upon which to levy.

Under these circumstances, is the constable, J. B. II., liable to the execution creditor A. C. M. & Co., in whose favor the execution issued, for wilfully and negligently refusing to levy upon the property in question? If so, then he and his bondsmen are liable to the plaintiff in this action.

The bond given by the constable, J. B. II., is conditioned that he shall faithfully and diligently discharge his duties as said constable. The duties and liabilities of a constable are largely fixed and determined by the statutes of the state.

Section 3334, General Code, provides, that all constables shall be ministerial officers in justice courts in their respective townships in civil cases * * * and civil processes may be executed by them throughout the county under the restrictions and provisions of the law.

Section 3335, General Code, provides, that each constable shall serve and execute all * * * executions and other processes to him directed and delivered and in all respects whatever do and perform all things pertaining to the office of constable.

Section 3337, General Code, provides, that each constable shall make due return of all processes to him directed and delivered at the proper office and on the proper return day thereof.

Section 10422, General Code, provides, that a constable is liable to the party in whose favor an execution issued to him for its amount, when he wilfully or carelessly omits to levy on property within thirty days.

We think it was the mandatory duty of the constable under these provisions of the statute to levy upon any goods and chattels belonging to the execution debtor, H. E. W., not exempt from execution, but it does not follow that the constable was required at his peril to levy upon property covered by a chattel mortgage which property was in the possession of the mortgagee who claimed to be the sole owner thereof.

sinking fund trustees by resolution dated December 30, 1912, accepted said bonds. There was not sufficient money in the hands of the sinking fund trustees to pay for said bonds, nor has there ever been at any time sufficient money for said purpose. The bonds ever since their acceptance by the sinking fund trustees have been and still are in the custody of said sinking fund trustees.

Almost two years after they were accepted, to-wit, November 30, 1914, the sinking fund trustees adopted a resolution to advertise them for sale, not for the purpose of meeting any emergency that had arisen, but solely for the purpose of raising money to pay for said bonds, and thus supply the city with funds with which to construct the city hall.

They were advertised for sale and on the 23d day of December, 1914, the sinking fund trustees accepted the bid of Fields, Richards & Company for said bonds.

Thereupon the plaintiff brought this action alleging various grounds why said sale should be enjoined, but the case turns on the question: Have the sinking fund trustees authority to purchase bonds from the city without paying cash for them?

In determining this question the court is without the light of precedent, there being no reported case where this question was raised.

In brief the claim of the plaintiff is that the sinking fund trustees are only authorized to invest the money received by them; that if they have no money to invest they must refuse the bonds when offered to them in their official capacity; that the word "invest" used in the statute presupposes that there is money on hand for the investment, and does not contemplate a purchase on credit.

The defendants contend that when the bonds were offered to the sinking fund trustees and accepted by them and delivered to them, this constituted a valid sale and delivery of personal property; that even if authority for such a purchase is not expressly given in the statute, there is nothing in the statute interdicting it.

The pertinent sections are as follows:

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General Code, 4506—"Municipal corporations having outstanding bonds or funded debts shall, through their councils, and in addition to all other taxes authorized by law, levy and collect annually a tax upon all the real and personal property in the corporation sufficient to pay the interest and provide a sinking fund for the extinguishment of all bonds and funded debts and for the payment of all judgments final except in condemnation of property cases, and the taxes so raised shall be used for no other purpose whatever."

Then follow some sections which provide for the appointment of sinking fund trustees and their compensation, bond and organization, etc., down to Section 4514, which says:

"The trustees of the sinking fund shall invest all moneys received by them in bonds of the United States, the state of Ohio, or of any municipal corporation, school, township or county bonds, in such state, and hold in reserve only such sums as may be needed for affecting the terms of this title. All interest received by them shall be re-invested in like manner."

General Code, 3922—"When a municipal corporation issues its bonds, it shall first offer them at par and accrued interest to the trustees of the sinking fund, in their official capacity, or, in case there are no such trustees, to the officer or officers of such corporation having charge of its debts, in their official capacity. If such trustees or other officers of the sinking fund decline to take any or all of such bonds at par and accrued interest, the corporation shall offer to the board of commissioners of the sinking fund of the city school district such bonds or so many of them, at par and accrued interest and without competitive bidding as have not been taken by the trustees of the sinking fund, and the board of commissioners of the sinking fund of the city school district may take such bonds or any part thereof."

General Code, 3923—"Only after the refusal of all such officers to take all or any of such bonds at par and accrued interest, *bona fide* for and to be held for the benefit of such corporation, sinking fund or debt, shall the bonds, or as many of them as remain, be advertised for public sale. In no case shall the bonds of the corporation be sold for less than their par value, nor shall such bonds when so held for the benefit of such sinking fund or debts, be sold, except when necessary to meet the requirements of such fund or debt."

An offer to sell personal property on one side and acceptance on the other accompanied with a delivery of the property, would constitute as between individuals a valid contract of sale.

However, there is a marked distinction between the powers of an individual to contract and the powers of a municipality. In dealing with a municipality it is not sufficient to say the law does not prohibit a contract or a particular course of procedure, but authority must be shown justifying it. The power of a municipality is limited. It has that which is expressly given or clearly implied, and no other; doubtful claims to power are resolved against it. And I assume the same principle applies in construing the power of a municipal officer or officers.

The language of the statute is:

"The trustees of the sinking fund shall *invest* all moneys received by them in bonds of the United States, the state of Ohio, or of any municipal corporation," etc.

The Standard Dictionary defines "invest":

"To use money for any purpose from which profit is expected; to lay out money or capital in the purchase of property."

Did the sinking fund trustees "use" or "lay out" money in the purchase of said bonds? They did not have and never have had sufficient money to use or lay out in their purchase. They simply promised to pay for them, hoping and expecting to realize sufficient money from the sale of said bonds to pay for them.

In construing a statute it is proper to consider the purpose of it, and the results which will follow its enforcement.

Let us suppose the sinking fund trustees were not able to realize enough to pay for the bonds, or that they were not able to sell the bonds at all. What redress would the city have? A money judgment would be vain. The sinking fund trustees would have no money, or at least not sufficient money to pay it.

In a proper case a court of equity will decree specific performance of a contract for a sale of personal property. If such a remedy existed in such a case it would be equally vain. Under

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such conditions all the city council could do would be to repossess itself of the bonds.

Or, again, if the sinking fund trustees have authority to accept one issue of bonds without paying cash for them, they have authority to accept another, and another, etc.

Then suppose the bond market is such that none of them can be sold, certainly a chaotic condition would result, the wheels of progress would be blocked, the city could not meet its obligations and its financial credit would be impaired or ruined.

The logical result of the contention of the defendants is to make the sinking fund trustees a brokerage house or selling agents for the city's bonds. Such is not the intent of the statute. While the sinking fund trustees constitute a branch or arm of the city government, and while, as was decided by the Court of Appeals of Cuyahoga County, in the unreported case of *City of Cleveland, by John N. Stockwell, v. Newton D. Baker et al*, the intent of the statute is to encourage the investment of money in the hands of the sinking fund trustees in the bonds of that municipality, yet such investment is discretionary with said trustees. If they see fit they may decline the bonds of the city, even though they have funds to invest, and may invest them in other securities permitted by statute. They are not selling agents; they stand upon the same footing as other purchasers.

It is further contended that the word "debt" of General Code, 2923, which states that the bonds shall be held for the benefit of "such corporations, sinking fund or debt," means the debt for which the bonds were issued, which it is argued in this case will be evidenced by the investment in the city hall.

The meaning of the language in question is not as clear as it might be as counsel frankly state, but the court can not agree with the above construction. The court is of the opinion that if the word "debt" is not mere surplusage, it means any valid debt of the city.

It is also contended that the sinking fund trustees have very broad powers, as held in *Cleveland v. Baker et al, supra*.

That case does hold they have broad powers in disposing of the securities in their possession; that they may sell them with-

out advertisement and below par. They are given this broad power to protect the faith and credit of the city.

It might be disastrous to the financial standing of a city which has an obligation to meet, to wait until bonds are advertised or until par or higher can be obtained for them. That case is not in point here, because the power of the trustees in acquiring bonds was not before the court.

The court thinks that a proper construction of all the sections of the statute bearing on the subject is, that the bonds of a city must be offered to the sinking fund trustees in their official capacity; if they have sufficient money in hand to invest in them, and see fit to do so, they may take the bonds. If they have not sufficient money to invest in them, it is then their duty to decline them. If they and all the other officers designated by statute refuse the bonds, it then becomes the duty of the city council to advertise them for public sale.

For the foregoing reasons the court is of the opinion the sinking fund trustees never obtained title to said bonds and are not entitled to their possession. The city council is entitled to their possession to proceed with them in accordance with the statute.

The injunction will be made perpetual.

**ENFORCEMENT OF JUDGMENT NOTWITHSTANDING
BOND TO STAY PROCEEDINGS.**

Common Pleas Court of Hamilton County.

ROBERT BUCK V. CINCINNATI TRACTION CO.

Decided, June 6, 1913.

Judgment—Enforcement of, Where Bond Has Been Given—Will Not be Permitted, Unless—Section 12269.

An application for leave to give a restitution bond and enforce the judgment, notwithstanding a bond has been given to stay proceedings, will not be granted, unless it appear upon the face of the record or is otherwise brought to the attention of the court that the only purpose of the defendant below in taking the case to a higher court is to harass the plaintiff and without cause deprive him of the

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fruits of his victory by exhausting his resources and withholding from him that to which he may be justly entitled. Such an application should be made to the judge who tried the case rather than to one who is a stranger to the merits of the controversy and the demands of justice as presented thereby.

Albert D. Alcorn and Robert S. Alcorn, for plaintiff.
Kinkead & Rogers, contra.

NIPPERT, J.

Plaintiff in this case seeks to enforce a judgment in his favor notwithstanding the filing of a bond by defendant to stay proceedings.

Section 12269, General Code, reads as follows:

"In an action on contract for the payment of money only or for injuries to the person, if the defendant in error gives adequate security to make restitution in case the judgment be reversed or modified, on leave obtained from the court below or a judge thereof in vacation, he may enforce the judgment notwithstanding the bond to stay proceedings," etc.

It is apparent that the application of this section lies within the discretion of the court and must not be acted upon arbitrarily, but within reason and justice as the facts in each case may demand.

Should it be apparent upon the face of the record, or from other indications brought to the attention of the court, that the only purpose of the defendant below in taking the case to the higher court is to annoy, harass, or, without good cause or reason deprive the plaintiff of the fruits of his victory, and by continued litigation exhaust the resources of the plaintiff or exhaust his physical or financial ability to continue the battle for what he may claim are his rights under the law, and where there is a palpable and unmistakable intention to withhold from the plaintiff below that to which he may justly seem to be entitled, it is then and then only that the court ought to avail itself of the power and authority granted it by the Legislature under the statutory enactment above set out.

The petition in this case was filed December 5, 1911, and within a year, to-wit, December 4, 1912, the action was tried,

and on December 6, 1912, a judgment was returned in favor of the plaintiff for \$1,000. A motion for a new trial was filed and overruled on December 23, 1912. On January 25, 1913, a bill of exceptions was filed and same was allowed on February 8, 1913. On February 14, 1913, error to the Common Pleas Court of Hamilton County was prosecuted, and all transcripts, original pleadings, entries, etc., were filed in the court of appeals, first appellate district of Ohio, on February 26, 1913. Thereupon plaintiff below, by his attorney, filed a motion in the common pleas court asking the court to enforce the judgment of \$1,000 upon plaintiff giving adequate security to make restitution in case the judgment rendered in said case be reversed or modified.

There is nothing apparent on the docket to show that there had been unusual or unnecessary delay on part of the defendant below to bring this cause to an early determination in the court below, and the dispatch with which the defendant below proceeded with the case to the court of appeals does not sustain any charge of delay such as might justify the court to invoke the extraordinary power granted it under Section 12269, General Code.

A supersedeas bond having been given and the execution stayed, it is now the duty of the plaintiff below, desiring to enforce his judgment under Section 12269, General Code, to show reasons why such a supersedeas bond should be nullified by this court by authorizing a restitution bond and issuing execution to enforce the judgment below.

As stated above, the court can find no just reason, upon the inspection of the record, why such unusual remedy should be permitted in this case. In the first place, the appearance docket shows, as set out above, that the action has been prosecuted with more than usual dispatch and that there has been no unnecessary delay in prosecuting error and docketing the case in the court of appeals. The brief for plaintiff in error was printed and in the hands of the court within two weeks from the day the petition in error was filed.

Coming now to examine the merits of the case itself, there is a question in the mind of the court whether it is proper for

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a judge other than the one who heard the controversy itself in the first instance to grant or refuse leave to enforce the judgment.

Judge Gholson, as early as 1855, in case of *Valley Bank v. West*, 2 Han., 62, stated that the tribunal which decided the controversy, being the one best acquainted with the merits of the case and the demands of justice, is the one best fitted to exercise this discretion and the very selection of the tribunal shows to a certain extent by what principles that discretion is to be governed.

Counsel in this case and the trial judge seem to think that the motion is of such a nature as to bring it properly within the work assigned to this particular court room, under the head of "miscellaneous matters," and this court being thus charged with the obligation of acquainting itself with the merits and the demands of justice in this action, it is necessary to examine the evidence, testimony of witnesses, in fact, the entire record of the case, and to some extent pass upon this case as though it came to this court on a motion for a new trial.

The court believes with Judge Gholson that the tribunal which is best acquainted with the merits of the case is the one who should be called upon to exercise its discretion, and it is the trial judge before whom the controversy was decided in the first instance and where judgment was rendered who ought to in the opinion of this court grant or refuse the application for a restitution bond.

However, under the circumstances, this matter having been brought into this court, though of concurrent jurisdiction with that of the trial judge, the court finds after carefully examining the record, the briefs and the authorities therein cited, that no such reason exists as would justify this court to grant leave to the plaintiff below to enforce his judgment by giving a restitution bond, and plaintiff's application is therefore refused.

**CONSTRUCTION OF THE WORD "BORROWER" IN THE
LICENSED LOAN OFFICE ACT.**

Common Pleas Court of Cuyahoga County.

FENN & FRENCH, CORRAN & FRENCH AND F. W. HENDERSON
V. STATE OF OHIO; THREE CASES.*

Decided, March 20, 1915.

Licensed Loan Offices—May Make Loans Other than on Chattels or Assignment of Wages—Without Filling Out the Card Provided in the Licensed Loan Office Act—Construction of the Word "Borrower"—Section 6346-3.

A loan office, doing business under the act to regulate and license the loaning of money upon chattels or personal property or salaries or wage earnings, is required to give the borrower a card containing detailed information with reference to the loan as provided in Section 6346-3, only in case the borrower is one who is obtaining a loan upon chattel property or by assignment of salary or wage earnings. Where the loan is upon real estate mortgage, or on a promissory note, or in any other form than on chattel property or by the assignment of wage earnings or salary, the said section has no application.

F. W. Poulson, for plaintiffs in error.

Austin & Kirkbride, contra.

LIEGHLEY, J.

Plaintiffs in error were arrested in the municipal court of Cleveland, Ohio, upon affidavits filed under Section 6346-3, General Code, which affidavits were all in substantially the same form. The following is the form of affidavit filed in case No. 6446:

"Before me, V. A. Holden, deputy clerk of the municipal court of Cleveland, personally came Herman Strunk, who being duly sworn according to law deposeth and saith, that on or about the 7th day of November, A. D. 1914, at the city of Cleveland, in said county of Cuyahoga, one George S. Fenn,

*Affirmed by the Court of Appeals July 1, 1915, without report.

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being then and there licensed by the state of Ohio, to engage in the business of making loans upon salaries and wage earnings, and one H. E. French did make a loan to one Herman Strunk, and that the said George S. Fenn and the said H. E. French did unlawfully fail and neglect to give to said borrower a card upon which was written in ink, typewritten or printed, the name of the person, firm or corporation making said loan, the name of said borrower, the amount of said loan, the amount of interest charged, the amount of expense charged exclusive of interest, the time for which said charge was made, the date when said loan was made, and the date when payable, and further, deponent says not, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the state of Ohio.

“(Sgd.) HERMAN STRUNK.”

Inasmuch as a disposition of case No. 6446 by this opinion will dispose of the other two cases, in view of the fact that the questions considered are the same in each case, this opinion will be confined to case No. 6446, *Fenn & French v. State of Ohio*.

The defendants were tried and convicted below upon the following agreed statements of fact:

“1. That H. E. French was on the seventh day of November, 1914, licensed under the laws of the state of Ohio to engage in the business of making loans upon salaries and wage earnings.

“2. That one H. E. French was then and there the employee of George S. Fenn in the conduct of said business, and for the purpose of the said George S. Fenn making loans for the said H. E. French.

“3. That one George S. Fenn, acting for said H. E. French, made a loan to one Herman Strunk on the seventh day of November, A. D. 1914.

“4. That said George S. Fenn, acting for the said H. E. French, took from the said Herman Strunk a promissory note and tracer hereto attached.

“5. That neither the said George S. Fenn or the said H. E. French, on the said date, or at any time thereafter, delivered to the said Herman Strunk a card or papers of any kind upon which was written in ink, typewritten or printed, the name of the person, firm or corporation making said loan, the name of said borrower, the amount of said loan, the amount

of expense charged, exclusive of interest, the name for which said charge was made, the date when said loan was made and the date when payable.

"F. W. POULSON,
"C. T. AUSTIN, Atty."

The following are some of the authorities cited by counsel: *State v. Hipp*, 38 O. S., 199; *Cain v. Peoples Salary Loan Co.*, 15 C.C.(N.S.), 172 (34 O. C. C., 115); *Thuma v. State*, 15 N.P. (N.S.), 625; *Sanning v. Cincinnati*, 81 O. S., 142; *French v. Toledo*, 81 O. S., 161; *State v. Phillips*, 85 O. S., 317-23; *State v. Rouch*, 47 O. S., 478-85; *Hirn v. State*, 1 O. S., 15; *Miller v. Crawford*, 70 O. S., 207; *Williams v. Donough*, 65 O. S., 499; *Cleveland v. Clements Bros. Const. Co.*, 67 O. S., 197; *Ex parte W. C. Woods*, 16 L. R. A. (N. S.), 450; *Oregon v. Wright*, 21 L. R. A. (N. S.), 349; *Wright v. Hart*, 2 L. R. A. (N. S.), 338.

It is conceded that the loan made by the plaintiff in error to Herman Strunk was upon a promissory note, with a so-called "tracer" attached, containing information in respect to the borrower.

It is claimed by the plaintiffs in error,

First, that the word "borrower," used in Subdivision 3, is limited to loans upon chattels or personal property and loans upon salary assignment provided for in Subdivision 1 of said act.

Second, That if the word "borrower" is construed to include loans upon promissory notes or otherwise than loans secured by chattel mortgage or salary assignment, that said act is unconstitutional.

It is argued by counsel for the state, that inasmuch as the license granted by the state under this act creates a right in the plaintiffs in error to do certain things which otherwise would be unlawful in respect to interest and charges, that thereby there is imposed upon them certain duties, which duties must be strictly performed and complied with. That inasmuch as they are engaged in the loan business under this act, all loans made by the plaintiffs in error must be in accordance

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with the provisions of this act, whether a chattel mortgage is executed or salary is assigned, or upon promissory notes, or otherwise. Analogously, it was argued by counsel for the state that the situation in this case is similar to a situation wherein a saloon license is granted: that the licensed saloon keeper is obliged to obey the Sunday closing laws and obliged to heed the laws against sales of liquor to minors, etc.

The contention of the state that the case at bar is analogous to a case of saloon license is not convincing. The license and various laws on the statute books regulate not only the place but the business of the saloon-keeper. This act and one relating to usury constitute all the legislation relating to this subject, and does neither regulate the place nor the business of the licensed loan agent, except as provided in Section 1 of said act.

Penal statutes must be strictly construed. And general words following particular and specific words must ordinarily be confined to things of the same kind as those specified. *Schultz v. Cambridge*, 38 O. S., 663.

In gathering the meaning of an act of legislation, the whole act must be taken together to ascertain the intent, and the title to an act may be considered to explain its object and solve what is doubtful, but will not limit its scope if intended otherwise. *State ex rel v. Kinney*, 11 O. C. D., 261-5; *Terrell v. Anchauer*, 14 O. S., 80.

"In giving construction to a statute, all its provisions must be considered together. We must endeavor to get at the legislative intent by a consideration of all that has been said in the law, and not content ourselves with partial views, by selecting isolated passages, and holding them alone up to criticism." *State v. Rouch*, 47 O. S., 478-85.

Suppose we examine and compare the sections of said act.

Section 6346-1 provides:

"No person, firm or corporation * * * shall engage or continue in the business of *making loans upon chattels or personal property* * * * or of purchasing or making *loans upon salaries or wage earnings*." * * *

Section 6346-2 provides:

“Applications for license to conduct *such* business must be made in writing to the Secretary of State, and shall contain * * * the kind of business which is to be conducted, whether *chattel mortgage or salary loan.*” * * *

Section 6346-3 provides:

“Every person, firm or corporation *licensed as herein provided* shall give to each *assignor or borrower* a card upon which shall be written * * * the name of the person * * * making *such* loan or purchase, the name of the assignor or borrower.” * * *

Section 6346-4 provides:

“No such person, firm or corporation *so* licensed shall receive any *assignment of salary or wages* signed in blank, but all blank spaces shall be filled * * * showing the name of the firm, person or corporation by whom the person making the *conveyance or assignment* is employed. If the borrower is married, the *contract, conveyance or assignment* shall be void unless it also contains the name of husband or wife, as the case may be, of the borrower.”

Section 6346-5 provides:

“No such person, firm or corporation shall make a *loan upon chattels or personal property* of any kind whatsoever, or purchase a *salary or a wage earning* of another * * *. In case any *loan or contract of any kind provided for in the preceding sections* is not paid when due.” * * *

Section 6346-6 provides:

“Any person, firm or corporation * * * violating any provision of this act, or that carries on the business of making loans upon chattels or personal property of any kind whatsoever, or of purchasing or of making loans upon salaries or wage earnings.” * * *

It will be observed that in all sections of this act reference is made only to loans upon chattels and upon salary or wage assignment; that in all the sections two kinds of loans are specifically mentioned, except in Section 3, where the general terms of “as-

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signor or borrower" are used. It is contended by the state that the use of the word "borrower" in Section 3 shows an intendment on the part of the Legislature that all loans made by one licensed to engage in the loan business under this act must be made in conformity with the provisions of this act; that for the reason that the plaintiffs in error here are licensed under this act, and that they made the loan involved in this action upon a simple promissory note, they are criminally liable for the reason that they failed to comply with all the details required by Section 3 of said act.

The single question for determination is whether, in construing Subdivision 3, the meaning of the word "borrower" is limited to loans upon chattels and loans upon salary or wage assignments. Or, was it intended by the Legislature, by Subdivision 3, in the use of the word "borrower," that the same should refer to all loans made by a person, firm or corporation licensed under this enactment.

"If the title to a statute be a restrictive one, carving out for consideration a part only of a general subject, legislation under such title must be confined within the same subject." 93 Minn., 210; 120 Am. St. Rep., 191.

"Any means reasonably adapted to secure the object indicated in the title may be included within the body of the act, and if by any fair intendment the provisions in the body have a necessary or proper connection with the title, such provisions are not objectionable. 250 Ill., 345.

In the case of a city ordinance drawn in terms similar to this act passed by the city of Toledo, Ohio, with the objects and purposes of said ordinance apparently the same as this statute, said ordinance, upon review by the Supreme Court of Ohio, received a strict construction in conformity with the authorities above cited. *French v. Toledo*, 81 O. S., 161.

"An act to levy an annual license tax upon all persons engaged in the business of lending money on or purchasing time, wages or salaries of wage-earners and providing that the license of each money broker, money lender or person lending

money on or purchasing time, wages or salary of laborers which are graded according to the actual capital in use in the business, imposes a license on those who purchase time or lend money on wages and salary; and on making loans to wage and salary owners on the moral security of their salaries and wages without assignment of salary and wages is not within the act." *State v. Cotton*, 128 La., 750.

Additional authorities in accord herewith may be found in Vol. 18, American Digest, Dec. Ed.—Statutes, Sec. 109.

This borrower is in the same position as if he had borrowed from one not licensed by the state. If usury intervenes, his remedy is provided the same as in all other cases. The loan agent has no greater weapon in his hand than any other holder of a promissory note.

In accordance with the decisions above cited, and after a careful comparison of the various sections of this act, we have arrived at the conclusion that the word "borrower," as used in Section 3, is limited to loans upon chattels and assignments of wages or salary; that the fact that a person, firm or corporation is conducting a loan office under a license from the state under this act, does not preclude loaning upon real estate mortgage or promissory note or in any other way than upon chattel mortgage or salary assignment as provided in Section 1 of said act without complying with details provided by Section 3 of said act. Section 1 limits the scope of said enactment.

We are therefore of the opinion that the judgment of the lower court was erroneous, and the same is reversed at the costs of the defendant in error.

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Wiese & Hanley v. Cincinnati.

**AS TO SEPARATION OF BIDS FOR LABOR AND MATERIAL IN
BIDS FOR MUNICIPAL WORK.**

Common Pleas Court of Hamilton County.

WIESE & HANLEY V. CITY OF CINCINNATI.*

Decided, November, 1913.

*Municipal Contracts—Separation of Bids for Labor and Material—
Estoppel—Section 4329, General Code.*

The provisions of Section 4329, General Code, that in submitting a bid for a municipal contract which embraces both labor and material, they shall be separately stated with the price thereof, is not a restrictive provision of the nature and kind against which no estoppel will lie, but is largely a provision for the guidance of the officer upon whom the duty devolves of awarding the contract; and where it appears that the rights of the municipality suffered no prejudice by the acceptance of a bid and the awarding of a contract thereunder, and the work was done in accordance with the specifications and was accepted, estoppel lies against denial by the city of liability therefor.

Frank H. Kunkel, for the plaintiffs.

Mitchell Wilby, Assistant City Solicitor, contra.

GEOGHEGAN, J.

This was an action to recover from the city of Cincinnati the sum of \$1,172.25, being a retained ten percentum of the amount found to be due under a certain contract entered into between the plaintiffs and the defendant, the city of Cincinnati.

Counsel for both parties have agreed upon all matters, including the amount to be paid to plaintiffs in case the courts determine in their favor the single issue presented by counsel and hereinafter noted.

On the 4th day of October, 1904, the plaintiffs submitted a certain bid for a street improvement in the city of Cincinnati,

*Affirmed by the Court of Appeals without opinion, May 21, 1915.

known as the improvement of Kineon avenue from Maxwell place to Rudolph avenue, by grading, setting curbs and crossings, flagging and paving gutters, and macadamizing the roadway, and constructing the necessary drains and retaining walls. On November 9th of the same year they were awarded the contract and shortly thereafter proceeded with the work and completed it, and upon certificate of the engineer were paid ninety per cent. of the total cost thereof, ten per cent being retained under the terms of the contract for five years as a guarantee that the plaintiffs would keep the street in good and proper repair.

It is conceded that all the necessary statutory steps in regard to this kind of improvement were carried out, and counsel for the parties have agreed as to certain differences that existed between the parties as to the amount of repair work done during the five year period by the city, which was to be charged under the contract to the plaintiffs.

The only defense that the city of Cincinnati now makes to this action is that the contract was illegal and void, inasmuch as the bid presented for the work did not contain a separate statement of the labor and material to be used, with the price thereof, as provided by Section 4329 of the General Code.

The various items of the bid, as shown from Exhibit "A" attached to the answer of the city, were as follows:

Broken stone, per cu. yd.....	\$1.50
Crossings, per lin. ft.....	.50
Curbs, Pattern—	
B 5 inch limestone.....	.70
B 5 inch limestone circular.....	1.40
Grading, per cu. yd.....	.33
Limestone screenings	2.50
Gutters, flagging and limestone, per lin. ft.....	1.10
Rolling, per sq. yd.....	.04
Masonry rubble, uncoursed, per cu. yd.....	4.00

With reference to the above, the following stipulation was entered into by counsel:

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"It is hereby agreed and understood by the parties herein that the allegations of the reply and supplemental reply are not intended to and do not deny the allegation in the first defense of the answer, that the price of labor and materials were not separately stated in this contract, other than as shown by the bid, page 3, Exhibit 'A,' which plaintiffs claim shows a separation of work and material. It is left to the court to decide whether there was in fact such a separation as shown by the contract and bid involved in this case.

"It is further stipulated and agreed by and between plaintiffs and defendant that all other defenses raised by the answer of the defendant herein are waived and that as to such other defenses, the equities and law of the case are with the plaintiffs and that in the event the issue raised by the first defense is decided in favor of plaintiffs, that a judgment is to be rendered in favor of plaintiffs for eleven hundred (\$1,100) dollars."

Passing for the present the question of whether or not there was an actual separation of labor and material, counsel for the city contends, in support of his motion for judgment, that the doctrine laid down in *McCloud v. Columbus*, 54 Ohio State, 439, to the effect that the restrictive conditions of statutes with reference to municipal corporations must be strictly complied with in order that a recovery may be had on the contract, is applicable to the state of facts before us here.

I have made a careful and exhaustive examination of the authorities in this state supporting this doctrine, and find that in *McCloud v. Columbus*, *supra*, there was a failure to advertise for bids; that in *Lancaster v. Miller*, 58 Ohio State, 558, there was a failure to advertise and a failure to obtain a certificate of the auditor or clerk that there was a sufficient amount in the fund set aside for the purpose to pay the city's portion for the work done under the contract. In *Buchanan Bridge Company v. Campbell et al*, 60 Ohio State, 406, there was an absolute failure on the part of the county commissioners to comply with any of the provisions of the statutes with reference to the building and constructing of county bridges and the action of the plaintiff was based entirely upon a *quantum meruit*. In *Comstock v. Village of Nelsonville*, 61 Ohio State, 228, there was a failure to obtain the clerk's certificate. In *Wellston v. Morgan*, 65 Ohio

State, 219, there was no ordinance of council authorizing the improvement. In *Village of Carthage v. Diekmeyer*, 79 Ohio State, 223, there was no clerk's certificate as to the availability of the funds as provided by the so-called Burns law.

It will be observed that in all the above cases there was an absolute failure to comply with those restrictive provisions of the statute with reference to public improvements, that are designed to prevent municipal extravagance and undue favoritism on the part of municipal officers towards persons seeking contracts for public work. To this extent, however, and no further has the Supreme Court gone. The Supreme Court has not at all decided that under no circumstances shall the municipality be estopped to deny its liability because of failure to comply with the strict letter of the statute, but has held that wherever there has been a failure to substantially comply with a restrictive provision of the statutes then no estoppel will lie. However, in the case at bar it is conceded that there was a substantial compliance with the statute in reference to all those conditions referred to in the various cases above, and that the city accepted the work and paid for it with the exception of the retained ten percentum.

I am rather inclined to the opinion that the doctrine laid down in *Mt. Vernon v. State*, 71 Ohio State, 528, should be applied to the facts of the case at bar. The first paragraph of the syllabus in that case is as follows:

"Where a municipal corporation has entered into a contract with an individual, under and by virtue of a statute which is unconstitutional and the subject-matter of the contract is not *ultra vires*, illegal or *malum prohibitum*, and the facts are such, as against the corporation, as would estop an individual from setting up as a defense the unconstitutionality of the statute, the municipal corporation will also be so estopped."

While it is true that Section 4329, General Code, provides that where the work bid for embraces both labor and material, they shall be separately stated with the price thereof, I am inclined to the opinion that the provision is largely for the guidance of the officer having the duty to award the contract, rather than as a

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restrictive provision of the nature and kind against which no estoppel will lie.

The view that I have taken, that under the circumstances of this case the city should be estopped from denying its liability, is supported in a very able opinion in the case of *McGonigale v. City of Defiance*, 140 Fed., 621, wherein Judge Taylor distinguishes between that kind of estoppel which in good conscience and having regard to the duty of the person who contracted ought to be effective, and that which public policy demands should not be permitted to make an invalid contract valid.

I can not see what principle of public policy would be invaded by holding that the city is estopped to deny the validity of the bid upon which this contract was made, where all the work has been done and the city has accepted it and paid for all of it except the guarantee fund, which was to be retained under the terms of the contract.

I am therefore of the opinion that under all the circumstances of the case, equity and good conscience require me to hold that the city is so estopped.

In passing, it might be well to call attention to the rule laid down in *Ross v. Board of Education*, 42 Ohio State, 374, wherein the third paragraph of the syllabus is as follows:

“The board may waive defects in the form of a bid where such waiver works no prejudice to the rights of the public for whom the board acts.”

In that case it was urged that the board of education had no right to accept a bid for work embracing both labor and material which did not separately state the prices of labor and material.

There is no claim made here that there was any prejudice to the rights of the public in the acceptance of this bid and the awarding of the contract thereunder.

In fact, all the circumstances indicate that the work was done in accordance with the plans and specifications and that all statutory requirements had been complied with. So, upon this view of the case it would seem that the motion of the city for judgment is not well taken.

Now, with reference to the other view of the case, if any reference is here necessary, to-wit: the question as to whether or not there was actually a separation of labor and material in this bid I simply call attention to the opinion of my colleague, Judge Dickson, in *Warren Bros. Co. v. City of Cincinnati*, 17 N.P.(N.S.), —, wherein, under similar items of bid, he held where there is a question as to whether or not there was an actual separation, which can not be precisely determined from the nature of the bid itself, that it is best that the contractor have his pay less any damage that the owner may show, and that all doubtful cases should be resolved in favor of him who has done the work.

The city's motion for judgment will therefore be denied and a judgment will be entered for the plaintiffs, in the amount as agreed upon and set forth in the stipulation.

DISCHARGE OF MEN IN THE CLASSIFIED SERVICE.

Superior Court of Cincinnati.

STATE, EX REL JAMES CONNOLLY, v. PHILIP FOSDICK, DIRECTOR
OF PUBLIC SERVICE, ET AL.

Decided, June, 1915.

Civil Service—No Prohibition Against Discharge Except for Political or Religious Reasons—Courts Can Not Inquire into the Truth or Falsity of Reasons Assigned, When.

1. The civil service statute of this state (General Code, Section 486-17; 103 O. L., 707), forbids discharge from the classified service "for religious or political reasons" but contains no other prohibition in this respect, and where the reason assigned for a discharge is not "religious or political" and the requirements of the statute as to notice, furnishing reasons and affording time for explanation have been complied with, the court can not compel the reinstatement of the person thus discharged.
2. Where the matters of fact assigned as reasons would, if true, afford ground for discharge and it is not claimed that the discharge was

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made for "religious or political reasons," the court can not inquire into the truth or falsity of the assigned reasons.

Moulinier, Bettman & Hunt, for relator.

Walter M. Schoenle, City Solicitor, and *Carl M. Jacobs, Jr.*, Assistant Solicitor, contra.

PUGH, J.

The petition in this case sets out that, on March 5th, 1912, the relator, James Connolly, was duly appointed telephone clerk in the water works department of the city of Cincinnati; and "that said position was at the time of such appointment and has been ever since and is now in the classified service of said city; that relator was appointed from an eligible list, certified by the civil service commission of said city," and that the relator "occupied said position" and performed the duties thereof from the date of said appointment up to and including April 5th, 1915.

On April 3d, 1915, the director of public service, "the appointing officer," discharged the relator and, in the written notice served upon the latter assigned as the reason:

"Failure to report one of the valvemen under his charge for reporting for work in an unfit condition."

This is an action wherein it is asked that a writ of mandamus be issued to the said director requiring him to reinstate the relator and for an injunction against the civil service commission forbidding it from certifying any other person for appointment to the position.

The petition, after setting out a copy of the order of discharge, recites:

"That the said reasons for discharge given in said order are and were not true; that said reasons given have absolutely no basis of fact and are completely fictitious; that relator was never in charge of any valve-men; that said order and reasons for discharge are therefore not in accordance with the civil service statutes of the state."

It is claimed that the discharge, under the circumstances above set forth, was illegal.

The defendants have filed a general demurrer to this petition, and the only question therefore is whether the discharge is in violation of the civil service law of this state.

The matter of discharge from the classified service is regulated by General Code, Section 486-17 (103 O. L., 707), as follows:

"No person shall be discharged from the classified service, reduced in pay or position, laid off, suspended or otherwise discriminated against by the appointing officer for religious or political reasons. In all cases of discharge, lay off, reduction or suspension of a subordinate, whether appointed for a definite term or otherwise, the appointing officer shall furnish the subordinate discharged, laid off, reduced or suspended with a copy of the order of discharge, lay off, reduction or suspension, and his reasons for the same, and give such subordinate a reasonable time in which to make and file an explanation. Such order together with the explanation, if any, shall be filed with the commission."

This section forbids discharges for "religious or political reasons" but says nothing whatever concerning discharges for other reasons. Before the enactment of the civil service statute, the appointing officer, in cases like the one at bar, could legally discharge appointees for any reason that appealed to him, or, indeed without any reason at all. The section above quoted withdraws this power of discharge in the two instances specified, *i. e.*, where the reasons are "religious or political," but leaves it intact in all other cases.

There is no allegation in the petition in this case nor has any claim been made that the discharge was for "religious or political reasons." So far as the averments of the pleading go, the director may have removed the relator through mistake, or there may have been a disagreement or misunderstanding as to the scope and extent of the subordinate's duties. In any event, the court has no jurisdiction to review the act of an appointing officer in making a discharge where all the requirements of the statute, such as relate to giving notice, furnishing reasons and affording time for explanation have been complied with, and there is no claim that the discharge was for "religious or political reasons."

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The requirement that the appointing officer shall furnish the reason for the discharge appears to have been intended as a safeguard against discharges on the prohibited grounds. There is nothing in the civil service statute that suggests or conveys the notion that discharges can not be made for reasons which are not "religious or political," and it is incomprehensible that the General Assembly could have intended to forbid them and yet have left the matter entirely to construction. The natural inference would seem to be that when the Legislature undertook to enumerate the reasons for which discharges could not lawfully be made, it would name them all.

The case of *State, ex rel Leroy, v. Holmes*, decided by this court and reported in 15 Ohio N.P.(N.S.), 630, is not analogous to the one under consideration. In that instance, it was alleged in the petition that the relator had been removed for "political reasons" and that the ones assigned in the order of discharge were a mere sham or cover for the real ones. In determining this issue of fact, the court had to inquire, *inter alia*, into the truth of the alleged reasons for the purpose of ascertaining whether as claimed they were a sham or disguise for political motives and influences.

In the case at bar, even if the statements of fact furnished the relator as a reason for his discharge were "not true," had "absolutely no basis of fact," and were "completely fictitious" as alleged in the petition, none the less the discharge was not in violation of the civil service law of this state unless made for "religious or political reasons."

The suggestion that a civil service statute like this affords no great protection to appointees in a competitive classified public service, may be well founded, but it should be addressed to the legislative branch of the government and not to the judicial. The General Assembly has enacted this law and the courts must accept it as thus enacted and not attempt to improve or amend it by judicial interpretation.

The demurrer will therefore be sustained.

**COMPENSATION FOR THE SETTLEMENT OF THE ESTATE
OF A DECEDENT.**

Probate Court of Columbiana County.

IN THE MATTER OF THE ESTATE OF ROBERT R. POLLOCK,
DECEASED.

Decided, May 15, 1915.

*Estates—Letters of Administration Relate Back to Death of Decedent,
When—For What Purpose—Extra Compensation.*

1. Where one of the next of kin and an heir at law by agreement or with the knowledge and consent of the other next of kin and heirs at law undertakes to settle and adjust the affairs of the estate of a decedent and by reason of such arrangement collects assets and pays valid debts of such estate and is later duly appointed to administer thereon, the letters of administration so issued relate back to the death of the decedent and thereby legitimate all transactions made under and by virtue of such arrangement; and such subsequent appointee may claim and be allowed the statutory per centum upon all assets so collected and disbursed and for such purpose letters of administration likewise relate back to the death of the decedent.
2. Executors or administrators *de son tort* are no longer recognized in Ohio.
3. Where an administratrix brings suit to sell the real estate of the decedent and such action is contested by one of the heirs at law, such administratrix is entitled to extra compensation for her time and expenses in attendance upon such suit, because such services are not in the common course of duty. She is likewise entitled to railroad fare and hotel bills under Section 10837, General Code, while traveling about in the discharge of the ordinary duties relating to the estate, and also to telephone tolls and postage. She is not entitled to *per diem* and allowance for expenses when traveling about the community where the estate is situated, in the discharge of her ordinary duties and where no expense is incurred. Such services are in the common course of her duty and for which the statutory per centum is intended to compensate.

Lodge Riddle, for exceptor.

J. F. Spence, for administratrix.

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FARR, J. (orally).

On the 12th day of April, 1915, Laura V. Pollock, as administratrix of the estate of Robert R. Pollock, deceased, filed her first account in this court, and on the 26th day of April following, Olive S. Summers, one of the heirs at law of said decedent, filed exceptions to said account, which were duly heard. By agreement of the parties, all except two of said exceptions were settled.

The first of those remaining is to the statutory per centum claimed by said administratrix on the sum of \$363.24 collected and disbursed by her prior to her appointment, which was made August 5th, 1913. Said disbursements are as follows:

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March	I. C. Bean, feed.....	\$1.14
April 8,	Ed. Chandler, wages for feeding.....	18.00
June 12,	Taxes	18.48
June 13,	Dr. T. A. Burneson.....	71.45
June 24,	C. G. Speidel.....	211.50
July 10,	Interest on note.....	35.00
July 26,	Interest on note.....	7.67
Total.....		\$363.24"

The evidence discloses that at a family meeting held soon after decedent's death, at which the exceptor was present, it was agreed that Laura V. Pollock should, as the representative of the other members of the family, settle the affairs of the estate without formal administration. Such must have been the arrangement because she proceeded so to do, made some collections and paid the foregoing debts and claims against the estate, and it was not disclosed that there was any objection from any legitimate source. She was not acting as administratrix *de son tort* (which is no longer recognized in this jurisdiction, 5 O. 533; 15 O., 517), because there was an agreement and consent of the parties in interest. She was not a stranger, but there by right, by virtue of her own interest and with the assent and knowledge of the other heirs at law. However, either because of some discord or for some other reason, Miss Pollock, on the

above date, made application and was duly appointed administratrix of her father's estate.

Is said administratrix entitled to such statutory per centum? Section 10837, General Code, provides as follows:

"Executors and administrators may be allowed commissions upon the amount of personal estate collected and accounted for by them, and of the proceeds of real estate sold by order of court to pay debts, or under directions of the will, which must be received in full compensation for all their ordinary services, as follows: for the first thousand dollars, at the rate of six per cent.; all above that sum, and not exceeding five thousand dollars, at the rate of four per cent., and all above five thousand dollars, at the rate of two per cent."

It will be observed that the above section provides that they may be allowed commissions "upon the amount of personal estate collected and accounted for by them." It is not provided that the foregoing applies only to funds administered in a trust capacity, but such is a fair inference. It is personal estate "collected and accounted for." Mr. Rockel discusses this question at Section 63 in which he observes as follows:

"For general purposes it may be said the letters of administration relate back to the time of the death of the intestate and vest the property in the administrator from that time. On this principle an administrator may maintain trespass for injuries to the goods of the intestate committed after his death and before the appointment; or maintain an action on a contract made with the defendant before appointment; or for money belonging to the estate collected by defendant before grant of letters; and on the same principle the heirs have no power before the appointment of an administrator to bind the personal estate by agreement.

"This doctrine of relation is a fiction of law to prevent injustice and the occurrence of injuries where otherwise there would be no remedy; and would not be applied in case where the rights of innocent parties intervened."

Mr. Woerner likewise observes at star page 385, Section 173, as follows:

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“173. *Relation of the Appointment to the Time of the Testator's or Intestate's Death.*—For particular purposes the letters of administration relate back to the time of the death of the intestate, and vest the property in the administrator from that time, attaching to property coming from a foreign jurisdiction as soon as it comes into that of the domicile. On this principle, an administrator may maintain trespass for injuries to the goods of the intestate committed after his death and before the appointment; or trover for property so wrongfully detained; or an action on a contract made with the defendant before appointment; or for money belonging to the estate collected by defendant before grant of letters or assumpsit for money paid to defendant's order. And on the same principle, the heirs have no power, before the appointment of an administrator, to bind the personal estate by any agreement. ‘This doctrine of relation is a fiction of law to prevent injustice, and the occurrence of injuries where otherwise there would be no remedy; and would not be applied in cases where the rights of innocent parties intervened;’ nor ‘to recognize, validate, and bind the estate by the unauthorized acts which have been done to the prejudice of the estate, by any one, while the title was in abeyance.’”

It will be observed that Mr. Rockel practically adopts the text of Mr. Woerner and both are sustained by the following cases: *Archdeacon v. Gas Co.*, 76 O. S., 97; *Gerard v. Jones*, 78 Ind., 378; *Hutchins v. Adams*, 3 Me., 174; *Dempsey v. McNabb*, 73 Md., 433; 21 Atl., 378; *Jewett v. Smith*, 12 Mass., 309; *Lawrence v. Wright*, 40 Mass. (23 Pick.), 128; *Gillkey v. Hamilton*, 22 Mich., 283; *Brackett v. Hoitt*, 20 N. H., 257; *Allen v. Eighmie*, 9 Hun., 201; *Holcomb v. Roberts*, 57 Pa. St. (7 P. F. Smith), 493; *Brown v. Lewis*, 9 R. D., 497; *Tucker v. Whaley*, 11 R. I., 543; *Cook v. Cook*, 24 S. C., 204; *Missouri Pac. R. Co. v. Bradley* (Neb.), 71 N. W., 283; *Alvord v. Marsh*, 12 Allen, 603, 604; *McVaighers v. Elder*, 2 Brev., 307, 313; *Miller v. Riegne*, 2 Hill (S. C.), 592, 594; *Bullock v. Rogers*, 16 Vt., 294, 296; *Jones v. Jones*, 118 N. C., 440; *Manvell v. Briggs*, 17 Vt., 176, 181; *Hatch v. Proctor*, 102 Mass., 351, 353; *Bennet v. Lynton*, 8 N. Y. App. Div., 387; 40 N. Y. Supp., 786.

It is therefore well settled by the great weight of authority that for all proper purposes letters of administration relate to the date of the death of the decedent. The reason is obvious. In

a large number of estates at least a small amount of business is transacted before appointment, sometimes more, sometimes less; but practically always the funeral expenses are incurred and as a matter of necessity. In many instances the care of live stock must be provided, or suitable provision made for perishable assets. Must it be held that such debts are not a proper charge against an estate? Suppose that in the case at bar, the administratrix herself had performed such labor or rendered any other necessary and beneficial service for the estate, would it be contended for a moment that such services were not a legitimate charge against the estate and payable by an administrator subsequently appointed? Scarcely so. In the case at bar the services were rendered before appointment, by the agreement, or at least with the knowledge and assent of all parties in interest. The money was received and disbursed in behalf of the estate after the death of the decedent. The transactions should appear in the account because they are a part of the business of the estate and because the letters of administration so far as said transactions are concerned relate back to the date of decedent's death. Must the administratrix even under agreement or with the knowledge and assent of all parties in interest, render the service gratis? It is conceded that Mr. Chandler was properly paid for feeding the stock; then why not Miss Pollock for rendering equally beneficial services for the estate? Suppose the same service had been rendered after her appointment, would or could statutory compensation be denied? Scarcely so. If letters of administration relate back to a decedent's death in order to legitimate any proper service rendered, then why not apply the rule to compensation for such services? It certainly does so apply; and the same principle that makes such services lawful and valid in behalf of an estate, carries with it the equitable right to compensation therefor. It would be without reason to say that such services were properly and legally performed but that no compensation could be allowed. The language of the statute should be followed, "Executors and administrators may be allowed commissions upon the amount of personal estate collected and accounted for by them" whether

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before or after appointment because such services are always for the benefit and welfare of the estate.

In fixing compensation for the services rendered in the case at bar, prior to the appointment, no safer guide could be followed than the above statute, according to which the administratrix has requested compensation by way of the statutory per centum. It must be held, therefore, that the appointment relates back to the death of the decedent for the purposes of the transactions above set out; that the administratrix has properly charged herself with the same and is entitled to the statutory compensation thereon and the exception is therefore overruled.

The second and last exception is to the item of \$25 claimed by the administratrix for extraordinary services rendered in behalf of said estate. By direction of the court a statement of the various items was filed, and the first is three trips from the family home to Lisbon at \$2 per trip to arrange for the sale of real estate. This was in the common course of her duty as administratrix. She was required to sell the real estate for the payment of debts; these trips were incident to the sale, on the proceeds of which she receives her statutory per centum. Mr. Rockel discussing extra compensation at Section 659, observes as follows:

“It is the object and purpose of the statute in fixing the *per centum* to be allowed upon the estate collected and accounted for, in that manner, to compensate the executor or administrator for all the services which are ordinarily required in order to convert the estate into money and distribute the same. This would include the expenses incurred going to and from the probate court for the purpose of getting out letters, filing inventories, sale bills, accounts, and such like matter. It would also include ordinary efforts to collect accounts or notes due the estate, and sell personal property or real estate if it be required.”

The allowance of said item is therefore refused. The second item is for \$3 for one day's attendance at the trial of the case in probate court for the sale of real estate. Conducting litigation is not contemplated in the common course of the duty of an executor or administrator, and the litigation instigated con-

cerning the sale of the real estate in the case at bar was by the exceptor and not by the administratrix. Judge Ferris observes, in *Re Estate of Johnston*, 4 N. P., 156, that:

“Where litigation was necessary in the interest of the estate, and the personal attention of the executors was required, extra compensation could be charged by the executors, and the court would allow a proper amount for such services on the principle of *quantum meruit*.”

The foregoing is sustained in principle, in *Re Estate of Wolfe*, 4 N. P., 336, 337; *Chatfield & Woods v. Swing & Mellen*, 7 A. L., 326. It follows therefore that the item should be allowed.

The next is three trips from Ashtabula to Lisbon at \$3 per trip, “in regard to the settlement of the estate.” There is nothing disclosed here that these trips were other than concerning the adjustment of the ordinary affairs of the estate; they are therefore in the common course of duty and the item can not be allowed. The next item is \$12 expenses of said three trips. Section 10837, General Code, expressly provides that “further allowance shall be made as the court deems just and reasonable for actual necessary expenses.” It was held to the same effect in *Reed v. Brown*, 10 C. C., 57, 58 (6 C. D., 154). As a matter of law and of right therefore said item must be allowed, likewise, and for the same reasons the last item of \$1 becomes a proper charge.

The administratrix is directed to correct her account in accordance with the foregoing and an entry may be taken accordingly.

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**STOCKHOLDER CAN NOT BE DEPRIVED OF HIS PROPORTIONATE
SHARE OF A NEW ISSUE OF STOCK WITHOUT
HIS ASSENT.**

Common Pleas Court of Hamilton County.

GRACE SUTTON, MAUDE SUTTON, SOPHIA L. SUTTON AND RUTH
ROY V. THE STACEY MANUFACTURING COMPANY
AND JAMES E. STACEY.

Decided, February, 1915.

Corporations—Increase of Stock—Holders of Original Stock Have Preference to Subscribe for New Stock—In such Proportion as the Number of Shares Owned Bears to the Whole Number of Shares Before the Increase—Majority Stockholders Have no Power to Give to One of Their Number a Certain Number of Shares of the Increased Stock Without the Assent of the Minority Stockholders—Non-Assenting Stockholder Can Compel Restitution, Unless.

1. Where the stock of a corporation is increased, the holders of the original stock have a preference to subscribe for the new stock, each original stockholder being entitled to such proportion of the new stock as the number of shares owned by him bears to the whole number of shares before the increase, and it is beyond the powers of the majority stockholders to give to one of their number a certain number of shares of the increased stock without the assent of the minority stockholders.
2. Where new stock is issued as against the surplus assets of a corporation a stockholder can not be deprived of his proportionate share of the stock so issued without his assent.
3. Where the majority stockholders of a corporation attempt to make a donation of a portion of shares of stock which are issued against the surplus assets of the corporation, a non-assenting stockholder can compel the restitution to him of his proportionate share of the stock attempted to be donated, unless he has estopped himself to deny the validity of the attempted donation of the stock.
4. In considering the question of laches on the part of a non-assenting stockholder in setting up his rights a court of equity will not regard a delay in instituting proceedings so strictly where the parties are members of the same family as where they are strangers to each other.

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5. All the non-assenting stockholders may join in an action to compel restitution to them of their proportionate share of the increase if the stock has actually been issued, or to enjoin its issuance if it has not been issued.
6. A court of equity is not bound to confine itself to grant or refuse to grant the relief prayed for, but may grant such relief as the facts may show complainant entitled to, notwithstanding it is not precisely the relief that is asked for, and where a donation of stock is made against the assent of certain minority stockholders the court may compel restitution to them of their proportionate shares of the stock so donated without decreeing a restitution of the proportionate shares of the donated stock to the stockholders who assented to the donation, although the prayer is for the restitution of the entire amount so donated.

Ernst, Cassatt & Cottle, for plaintiffs.

Otto Pfleger and James E. Robinson, contra.

GEOGHEGAN, J.

This is an action brought by the plaintiffs against the defendants, the Stacey Manufacturing Company and James E. Stacey, president of the said company, for the cancellation of an issue of seven hundred and fifty shares of stock of the said company to the said James E. Stacey, to compel the said James E. Stacey to deliver up the certificate for said shares, if the same has been delivered to him, or to enjoin its delivery if the same has not been delivered to him, and to compel him to repay any dividends he may have received on said stock, and for such other relief as may be justified under all the facts and circumstances of the case.

A brief resume of the salient facts brought forth in the evidence in this case is necessary so that a complete understanding may be had of the ultimate determination of the issues of this case.

The Stacey Manufacturing Company has been in the business of manufacturing gas plants since 1855. Prior to 1880 it was a partnership; it was about that time converted into an Ohio corporation, having a capital stock of \$150,000. The business was originated by Henry Ranshaw and George Stacey, who were half brothers, and all of the stock of said corporation is now

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with the exception of a few shares held by employees and their representatives, in the possession of the descendants and relatives of the founders of the business.

James E. Stacey, the defendant herein, was elected president and general manager in July, 1901, and has been re-elected to that position annually since that time, the election taking place in the month of April of each year since 1901. At various times during the period from 1901 to 1912 the salary of said James E. Stacey was increased, and some time after his election as president and when his salary had been increased by various steps to \$6,000 a year, he was by resolution allowed a bonus, which was computed by allowing a dividend upon his salary proportionate to the dividend declared to the stockholders, and subsequently he was allowed a bonus in double the amount of said dividend.

Prior to the meeting of April, 1912, Mr. James E. Stacey made a proposition in writing to all the stockholders to increase the capital stock to \$1,000,000, \$100,000 of which was to be issued to him and a similar amount to others. It may be observed that at the time Mr. Stacey took hold of the company, in 1901, the surplus over and above the capital stock was \$10,090, and immediately prior to the meeting of April, 1912, the surplus had been increased to approximately \$600,000, and during all these years a dividend averaging forty-five per cent. upon the capital stock of \$150,000 had been declared to the stockholders.

The complainants are members of the Sutton family. Mrs. Sophia Sutton is the daughter of George Stacey, one of the founders of the business, and the other plaintiffs are her daughters. They own about twenty-two per cent. of the capital stock of the Stacey Manufacturing Company. When the proposition as to the increase of the capital stock was received by them they replied by telegram as follows:

“We have no objection to increase in capital stock, each stockholder to receive new issue in proportion to present holdings. But as to proposed new distribution, we should like to have plans in detail before consenting to same. We incline to

profit sharing arrangement such as was made for present manager."

This telegram was signed by James T. Sutton, who is the husband of Sophia Sutton.

No action was taken with reference to said proposition at the April meeting, but a committee was appointed to canvass the advisability of increasing the capital stock of the company and to report the same back to a special called meeting of the stockholders.

On June 12, 1912, notice of a meeting for July 15, 1912, was mailed to all the stockholders, and on July 15, 1912, the meeting was held. The plaintiffs at that meeting were represented by James Sutton, the son of Sophia Sutton and the brother of the other plaintiffs. After some discussion a motion was made to increase the capital stock of the company to \$750,000. This motion was carried unanimously. James E. Stacey then requested some action on his request for \$75,000 of the capital stock to be allotted to him. This aroused considerable discussion in the meeting. Propositions were made to Mr. Stacey to increase his salary to \$20,000 a year, but Mr. Stacey said that he wished to make some provision for himself and his family and that the increase of salary did not interest him and that if the stockholders did not accede to his proposition he would proceed to conclude other arrangements which he had already made. After some discussion, in which James Sutton took a prominent part, the following resolution was presented and passed:

"WHEREAS, The administration of the affairs of this company has been marked by extraordinary success, and

"WHEREAS, The report of the management indicates a probable continuation of such prosperity and enhancement of the value of the company's holdings; and

"WHEREAS, The president and general manager has indicated a desire to make provision for himself and family, by acquiring stock in the company, in lieu of part of his present remuneration;

"Therefore be it Resolved, That it is the sense of the stockholders of the Stacey Manufacturing Company, that provided the proposed increase of the capital stock to \$750,000 be author-

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ized by the Secretary of State of Ohio, one-tenth (1-10) of the said capital stock, that is, 750 shares of same, be issued to James E. Stacey, president and general manager of the company, in lieu of salary bonus at present received by him, with the further understanding that there shall be no further increase of salaries to the president and general manager or the assistant manager, or stock bonus issued, until such time as it shall appear necessary to increase the capital stock to \$1,500,000."

This resolution appears upon the minutes to have been "carried without a dissenting vote."

When said resolution was presented, James Sutton, the representative of the plaintiffs, stated that in so far as he personally was concerned he was in favor of the action taken, but that he felt his inability to vote the stock of his principals without consulting them and that therefore he declined to vote as for them.

Further proceedings were then had that day wherein the president and secretary were directed to prepare the necessary papers for the increase of the capital stock and to procure the proper certificate from the Secretary of State.

At a meeting of the board of directors, on December 2, 1912, \$600,000 was transferred from the surplus and undivided profits account for the purpose of paying in full for the new stock to be thereafter issued, \$75,000 to pay for 750 shares to be issued to J. E. Stacey, and \$525,000 to pay for 5250 shares to be declared as a stock dividend of three hundred and fifty per cent. upon the old stock.

On January 20, 1913, the board of directors approved the issue of said stock to James E. Stacey and recited that the entire increase of stock was "fully paid for out of the surplus assets of said corporation set aside for said purpose."

At the stockholders' meeting of April 14, 1913, a resolution was presented and signed by all the stockholders, except the plaintiffs, approving of said issue of stock to James E. Stacey, stating that he was "entitled to special consideration at the hands of the stockholders of said company."

Now, the first question that naturally arises in this case is the question as to whether or not this issue of \$75,000 worth of

stock to James E. Stacey could be made without the assent of each stockholder.

An examination of the record shows that this issue to Mr. Stacey was regarded by all of the stockholders as a donation of part of their holdings. It is so referred to by Mr. Stacey himself inasmuch as he requests the stockholders in consideration of his long and faithful services to issue the stock to him. Dr. Alvin Ranshaw, one of the stockholders, referred to it as a donation, as did Dr. George Ranshaw and Mr. F. A. C. Stacey, who presided at the meeting.

So, it would seem that, looking at this issue as a pure donation of part of their holdings to Mr. Stacey, it can not be held that a stockholder may be deprived of a part of his holdings by the majority of the stockholders without his assent.

The law on the subject is plain. Even where the stock of a corporation is increased for some purpose of the corporation and not as against an earned surplus, the uniform current of authorities is that the holders of the original stock have a preference to subscribe to the new stock, each original stockholder being entitled to such proportion of the new stock as the number of shares owned by him bears to the whole number of shares before the increase. This doctrine was first enunciated over a hundred years ago in the case of *William Gray v. Bank of Portland*, 3 Mass., 364 (November term, 1807), and has had the almost unanimous approval of the authorities ever since that time.

No better exposition of this doctrine can be found than in 4 *Thompson on Corporations*, Section 3642, which reads as follows:

“Right of old stockholders to subscribe for increased stock.

It is a rule of prime importance that where the stock of a corporation is increased the holders of the original stock have the preference to subscribe for the new; each original stockholder is entitled to such proportion of the new stock as the number of shares already owned by him bears to the whole number of shares before the increase. And of this right he can not be deprived without his consent, except where such stock is issued at a fixed price not less than par and he is given the right to take

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at that price in proportion to his holding, or some other equitable way whereby he may protect his interests. The reason for this rule is stated by the Minnesota court thus: 'When the proposition that a corporation is trustee of the corporate property, for the benefit of the stockholders, in proportion to the stock held by them, is admitted (and we find no well considered case which denies it), it covers as well the power to issue new stock as any other franchise or property which may be of value, held by the corporation. The value of that power, where it has an actual value, is given to it by the property acquired and the business built up with the money paid in by the substituting stockholders. It happens not infrequently that corporations, instead of distributing their profits in the way of dividends to stockholders, accumulate them till a large surplus is on hand. No one would deny that in such case each stockholder has an interest in the surplus, which the court will protect. No one would claim that the officers, directors, or a majority of the stockholders, without the consent of all, could give away the surplus, or devote it to any other than the general purposes of the corporation. But when new stock is issued, each share of it has an interest in the surplus equal to that pertaining to each share of the original stock. And if the corporation, either through the officers, directors, or majority of stockholders, may dispose of the new stock to whomsoever it will, at whatever price it may fix, then it has the power to diminish the value of each share of old stock, by letting in other parties to an equal interest in the surplus, and in the good will or value of the established business.' Directors are bound to afford existing stockholders an opportunity to subscribe for increased stock in proportion to their holdings, before disposing of the same in any other way."

The Minnesota case referred to by the author is *Jones v. Morrison*, 31 Minn., 140.

Certainly, if the stockholders have a right to subscribe to new stock in proportion to their holdings, this right would be doubly assured when the new stock is issued as against surplus, and it would seem to be fundamental that a stockholder could not be deprived of his proportionate share of the surplus without his assent. 10 Cyc., 543; 2 *Beach, Private Corporations*, Section 473; *Morawetz on Corporations* (2d Ed.), 455; *Knapp v. Publishers*, 127 Mo., 53; *Stokes v. Continental Trust Co.*, 186

N. Y., 285; *Eidman v. Bowman*, 58 Ill., 444; *Jones v. Railroad*, 67 N. H., 119.

In *Knapp v. Publishers*, *supra*, the court, at page 72, say:

"But where the object is not to increase the capital, but the additional shares are created on account of the existing capital or property of the corporation, the entire stock as then increased represents no more capital than the original shares had done, and the new shares are not owned by the corporation, but as soon as created become the individual property of the owners of the old shares in proportion to their holdings. (*Gibbons v. Mahon*, 4 Mackey, 136; 136 U. S., 549.) The corporation has no power to deprive the shareholders of this right."

In discussing the generality of the rule laid down in *Gray v. Bank of Portland*, *supra*, the Court of Appeals of New York, in *Stokes v. Continental Trust Company*, *supra*, at page 291, say:

"This decision has stood unquestioned for nearly a hundred years and has been followed generally by courts of the highest standing. It is the foundation of the rule upon the subject that prevails, almost without exception, throughout the entire country."

So, it would seem that at common law at least there was no power in the stockholders to give to Mr. James E. Stacey that portion of the increased stock that belonged to the plaintiffs in this case.

Counsel for the defendant, however, makes the rather ingenious argument that under the statutes of Ohio a majority of the shareholders have this power and that therefore the common law rule can not be applied to the facts of this case.

It is true that in 1852 (50 O. L., 274) it was provided that the directors of a company might dispose of the residue of the increased capital stock remaining unsubscribed in such manner as the stockholders for the time being might prescribe, and in 1865 (62 O. L., 134), an act supplementary to the former act was passed providing that wherever the stock of manufacturing, bridge or gas companies was increased the directors should apportion such increase *pro rata* to the stockholders of said company in proportion to their stock therein, but if any stockholder should not within thirty days pay to such company the full

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amount of said capital so apportioned to him his right thereto should be held to be declined and the directors were authorized to dispose of his share of the increase as the by-laws might prescribe. In 1872 (69 O. L., 24), the original act was amended by providing that a stock dividend against assets might be made upon a majority vote and the additional stock should be issued to the then stockholders of such company or association in proportion to the amount of stock then held by each stockholder and to no other party or person.

An examination of the provisions of these acts that are applicable to the case at bar will show that they were simply declaratory of the common law as evidenced by an almost unbroken line of authorities even before the passage of the acts in question.

Now, on the adoption of the revision of 1880, no special provision was made for the distribution of new stock. In other words, the various provisions as to the distribution of the new stock and the right of the stockholders to subscribe thereto were left out of the revision of 1880.

Counsel for defendants contend that inasmuch as in the revision of 1880 these provisions were dropped and that under the General Code pretty general authority is conferred upon three-fourths or other majority or fractions of the stockholders, a majority of the stockholders would have a right to pass a resolution such as was passed in the case at bar even as against the assent and protest of the minority.

I can not agree with this contention inasmuch as the provisions of the three acts referred to were simply declaratory of the common law and provided the machinery whereby the right of the stockholders to subscribe for the additional stock might be enforced and terminated, obviating the necessity for offering the stock and eliminating all question of what was a reasonable time within which the stockholder must make his election. Although these provisions were dropped in the revision of 1880, the principle that the stockholders should not be deprived of their right to share in the increased stock without their consent or its legal equivalent remained in its full vigor and especially would this be true in cases where the increased issue was against an earned surplus and paid for out of that surplus.

So, I have come to the conclusion that the plaintiffs are entitled to have their proportionate share of the increased stock unless it can be said that they assented to the proposed distribution of the said seven hundred and fifty shares of stock to Mr. James E. Stacey or that they are now estopped to deny his right to have the stock.

That brings us then to a determination of the further question—Did they assent or are they estopped to assert their rights?

That they did not assent is evident. In the first place their representative, Mr. James Sutton, said that he could not vote the stock for his principals, and this is corroborated by every witness on the stand. Further, at late as October 15, 1912, a copy of the minutes of the meeting of July 15th was sent to Mr. James T. Sutton to have him secure to same the signature of Mrs. Sutton and her three daughters and in that letter it was stated that Mr. Sutton voiced his inability to sanction the distribution of the stock to Mr. Stacey. The evidence disclosed that at no time did any of the plaintiffs expressly assent to this distribution of the stock and the very fact that as late as October, four months after the meeting, they were requested to approve of the action of the stockholders, indicates that in so far as the officers of the Stacey Manufacturing Company were concerned, including Mr. Stacey himself, they did not regard the plaintiffs as having assented to the transaction.

However, it is claimed that if they did not expressly assent, that they acquiesced in the transaction and by their failure to speak when they should have spoken they are estopped to assert their rights in the matter.

While some question has been raised as to whether or not the defendants in this case have set up in their answers a sufficient plea of estoppel, I have regarded this matter as if the plea were sufficient in law and have examined the evidence upon that assumption. However, an examination of the evidence does not convince me that Mr. James E. Stacey or the Stacey Manufacturing Company in any way changed their positions by reason of any silence or failure to act on the part of the plaintiffs. It was the understanding of their representative, James Sutton, and he so communicated to them that

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“The action which has been taken does not bind the stockholders in any way but is merely an expression of present opinion and the entire matter must again be considered by the stockholders when the application for recapitalization shall have been approved by the Secretary of State of Ohio. This will require several months and the new arrangement can not become effective until April, 1913.”

Counsel for defendants claim that this is a self-serving declaration on the part of an agent to his principals and should not be considered.

Under some circumstances there might be some force in this contention, but in this case we have to view the situation as it appeared to the plaintiffs in this case and determine from that whether they are guilty of such laches in asserting their rights in the matter as would justify an assumption of acquiescence on their part. It further appears that when James Sutton, at the July meeting, offered to telegraph to his principals requesting their authority to vote for the distribution of the stock to Mr. Stacey, he was assured by those present that there was no hurry, that the matter would not be consummated for some time and he would have plenty of time to communicate with his principals.

While it is true that there is in evidence a letter of James T. Sutton, the father of James Sutton, Jr., in which he says that he will have the minutes signed, the evidence shows that this letter was not written after consultation with his daughters and that his wife was at that time too ill to be consulted upon the subject.

In order that an estoppel may constitute a complete defense to the action, the burden is upon the party who relies upon it to prove clearly and unequivocally every fact essential to the estoppel (*Kroll v. Close*, 82 Ohio St., 190; *Woodruff v. Montgomery*, 11 C.C.[N.S.], 72). And in order that the estoppel may be available to the person who sets it up, he must show that he was misled by the apparent acquiescence or silence of the persons against whom he sets it up to his disadvantage, and he must also have been destitute of any knowledge of his legal rights and of the means of acquiring such knowledge. *Steel v.*

Smelting Co., 106 U. S., 447; *Lux v. Haggin*, 10 Pac. Rep., 674 (Supreme Court of California); *Wood on Limitations*, Chap. 62; *Morrell v. St. Anthony Falls W. P. Co.*, 26 Minn., 229; *Stockman v. Riverside L. & I. Co.*, 64 Cal., 57.

Now, applying these principles to the facts in this case, an examination of the evidence discloses that Mr. Stacey was very anxious to have the approval of the plaintiffs to the minutes which set forth the resolution authorizing the issue of the seven hundred and fifty shares of the increased stock to him. He called on Mrs. Roy in Seattle and discussed the matter with her; he had letters written to the Suttons at Berkley, California, asking for their approval. The only logical conclusion to be drawn from these circumstances is that he was aware that he would have no legal right to their proportion of the increased stock unless he had their assent thereto, and knowing this fact how can it be said that he was misled by their silence and that they are therefore estopped? If it be said that the plaintiffs took an extraordinarily long time before they asserted their rights in this matter and disapproved of the action of the stockholders, it must be remembered that they were out in California and that Mrs. Roy was separated from her family by many miles; that Mrs. Sutton is a very old woman and was for a long time inaccessible for consultation upon a business matter of this kind; that it was desirable that being of one family they should discuss the matter among themselves and take the same action in regard to same. Further, it must be considered that as Mr. Stacey was the brother of Mrs. Sutton and the uncle of the other plaintiffs a natural hesitancy would exist upon their part to antagonize him and to oppose his request made with such positiveness at the meeting at which their son and brother attended.

The Supreme Court of Ohio, in *Paschall v. Hinderer*, 28 Ohio St., 568, in discussing questions of estoppel, especially where close and intimate family relations are involved, say on page 582:

“It is always to be considered that it is a painful thing to take such proceedings as the present. They necessarily have a tendency to lessen affection between relatives, and delay ought

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not so seriously to prejudice the rights of the parties as in the case of strangers.' *Laver v. Fielder*, 9 Jur. (N.S.), 190.

"And in *2 Story's Eq.*, Section 1520, referring to the case cited, it is said: 'And delay in instituting proceedings where the parties are members of the same family is not so strictly regarded as where they are strangers to each other.'"

In my examination of this plea of estoppel, I have given careful examination to the entire evidence in the case; I have regarded the statements of Mr. James Sutton at the meeting, before it, and subsequent to it; I have also examined the record with reference to Mr. Stacey's consultation with the gentlemen in Chicago and elsewhere with reference to the starting of a new business; I have read and re-read the testimony in this regard; and I have come to the conclusion, after serious and mature reflection, that there was no laches on the part of the plaintiffs in this case that would justify the application of the doctrine of estoppel to their rights in this matter, and I am satisfied that Mr. Stacey was not misled in any way by their conduct so as to give away any of his valuable rights. It is true that when the stock was voted to him he was not to receive any further salary bonus, but this bonus had already been voted to him at the April, 1912, meeting, as it had been voted to him at all previous annual meetings of the stockholders, and there is nothing in the minutes of the July, 1912, meeting to indicate that the bonus voted at the previous April meeting was to be relinquished during the existing fiscal year. As to his subsequent receiving of a bonus it would depend entirely upon the good will of the stockholders and not upon any contractual right on his part. I am further satisfied that he knew or had the means of knowing that in so far as these plaintiffs were concerned he could not obtain their proportionate share of the stock without their express assent and that he knew from the time of the meeting, July 15, 1912, to the commencement of this action, that the plaintiffs were not assenting and it was improbable that they would assent to the distribution of their proportionate share of the increase to him.

A third question must be disposed of—the right of the plaintiffs to maintain this action.

The defendants claim that if any right exists in the plaintiffs at all it is an action at law for damages.

While there are some authorities that seem to support this view, I am not aware that the rule has ever been applied in cases precisely like the one at bar. The action here is really to enjoin the giving away of the plaintiff's property. It is not the kind of action, as found in a great many cases, that is based upon a refusal to permit a stockholder to subscribe to an increased issue and the subsequent selling of the stock to third persons who have no knowledge of the refusal to permit the stockholder to subscribe. This case is governed largely by the rule laid down in *Dousman v. Wisconsin & Lake Superior Mining & Smelting Company*, 40 Wis., 418, where it was claimed that if the plaintiff had any remedy at all it was at law, and the court said on page 421:

"But the effect of such an action would be to convert part of his interest as a shareholder into a judgment for damages; in other words, to sell a portion of his stock to the corporation. That he is not obliged to do. He has a right to maintain his proportionate interest in the corporation, certainly as long as there is sufficient stock remaining undisposed of by the corporation. Trading corporations of the character of the appellant have been likened to partnerships, and the remedies of stockholders to those of partners, by very high authority (*Gray v. Portland Bank*, *supra*; *Robinson v. Smith*, 3 Paige, 222; *Adley v. Whittable Co.*, 17 Vesey, 315). And equity has always afforded a remedy to a stockholder, in such a case as this, by injunction, account, or other appropriate decree."

This rule was followed in *Electric Company v. Edison Company*, 200 Pa. St., 516. An injunction in cases of similar import has been allowed in *Cuningham's Appeal*, 108 Pa. St., 546; *Wall v. Utah Copper Co.*, 70 N. J. Eq., 17.

So, I am of the opinion that the plaintiffs have a right to pursue the remedy sought for herein, unless by reason of the statute there has been a misjoinder of parties plaintiff in this action. However, before leaving this subject of the right of a stockholder to participate in an increase and his right to enjoin any interference on the part of others with his exercise of the right, I must acknowledge my indebtedness to the very able article by

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Mr. Frank M. Coppock of this bar, entitled: "Stockholder's Rights to Newly Issued Shares," appearing October 11, 1909, in Vol. 7 of the Ohio Law Reporter, pages 345 *et seq.* To any one who is interested in an examination of the various phases of the general subject I have been discussing, I can recommend no clearer or more concise treatment of the subject than is contained in that excellent article.

Now as to the question of joinder—it is claimed that the plaintiffs have no right to join in this action.

It would seem that Section 11254 of the General Code disposes of this contention. That section provides:

"All persons having an interest in the subject of the action, and in obtaining the relief demanded, may be joined as plaintiffs except as otherwise provided."

The joinder permitted by this section is certainly not the joinder relating to a joint cause of action because in that case all parties *must* be joined and if a party does not assent he must be made defendant. Section 11256 of the General Code.

In the case of *Osborne v. Wisconsin Central Railroad Company*, 43 Fed., 824, it was held that in order to avoid a multiplicity of actions, holders of different tracts of land may unite as plaintiffs to enjoin the defendant from bringing actions in ejectment, where the rights of action are against the same party and arising from some common cause, are governed by the same legal rule and involve similar facts, and where the whole matter might be settled in a single suit by all persons uniting as co-plaintiffs or by one of the persons suing on behalf of the others.

And this principle was further enunciated and its correctness sustained in the case of *Liverpool & London & Globe Ins. Co. v. Clunie*, 88 Fed., 160.

In the case of *Brown v. DeYoung*, 167 Ill., 549, cited by counsel for defendants, and to which a further reference will hereafter be made, the action was brought by all the minority stockholders, who joined as plaintiffs.

In *Insurance Company v. Ward*, 5 C.C.(N.S.), 514, the court, in discussing Section 5005. Revised Statutes (now Section 11254. General Code), say:

"In commenting upon this section, as found in the codes of several states, Mr. Bliss, on Code Pleading (3d Ed.), Section 73, page 116, uses this language:

"There is a distinction between the rule requiring persons united in interest to be joined and the one just given (the section of the code above quoted), as the latter does not contemplate a joint interest, nor is the union made imperative. In the cases where it has been sanctioned, the interest is called a common one—that is, certain persons are interested in that concerning which the wrong has been done, and will all be benefited by the relief which is sought; they have a common interest, and may join in seeking the relief. * * * In either case, they may unite in an action, notwithstanding the technical common law rule confining the union to those having a joint interest."

"Again, in Section 74, the same writer says:

"It shocks the prejudices of common law pleaders to speak of a union of plaintiffs where there is not a joint interest; and, such is the effect of legal education and long habits of thinking, that, what seems so natural in a proceeding to prevent a common injury, or to set aside a sale for the benefit of common creditors, or to subject to their respective claims the assets of an estate, seems almost impossible, in case a sum of money is sought to be recovered in which sundry persons have a several, and perhaps unequal, interest. But it has come to be generally conceded that the rule is universal in its application, as it is in its terms: and if two or more are interested in the subject of the action, and in the relief sought, they may unite as plaintiffs for the recovery of money, or of specific real or personal property."

"This subject is further discussed in the subsequent sections of Bliss, and also in Pomeroy on Code Remedies, Sections 41, 62, 63. The purport of the discussion by each of these writers is, that, under the system introduced by the code of civil procedure, the rules which were in force under the common law system are so relaxed as to conform in large measure to the rules in equity pleadings, and to authorize, though not necessarily to require, all who have an interest in the subject of the action, to unite in bringing suit."

So, it would seem that the point of misjoinder in this case is not well taken. It would certainly be rather peculiar, at this time, when the whole trend of judicial effort is toward the simplification of procedure, to so rule in this case that all the plaintiffs would be compelled to file separate suits involving the

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same subject-matter, against the same defendants, asserting the same rights, and asking the same relief.

Having, therefore, determined that the plaintiffs are entitled to relief in this action, it now becomes necessary to determine to what extent the court shall allow the prayer of their petition.

The plaintiffs pray that said issue of stock to the said James E. Stacey be canceled; that if said certificate has not been delivered to said James E. Stacey that the delivery of same be enjoined; that if it has been delivered to him, he be required to return the same, and that he be ordered to repay to the corporation any dividends received by him thereon; that said corporation be enjoined from treating said stock as valid or transferring said stock upon its books, and for all other relief to which they may be entitled in the premises.

However, only the plaintiffs in this case are complaining of the action of the stockholders. The other stockholders have ratified the action taken at the stockholders meeting of July 15, 1912. They are not here now asserting any claim to any portion of the seven hundred and fifty shares of stock issued to the defendant, James E. Stacey. As this court is not concerned with the rights of any person who is not before the court seeking a right, the court is inclined, although the prayer of the petition is very broad, to narrow it to afford the plaintiffs the relief which they seem to be in equity entitled to.

The court is inclined to adopt the rule laid down in the case of *Brown v. DeYoung*, 167 Ill., 549, where in a suit to compel the restoration to a corporation of misappropriated funds and where if the decree were granted it would benefit not only the non-assenting stockholders but also the assenting stockholders, it was held that the decree should be so framed as to benefit non-assenting stockholders only. A similar rule was adopted in *Dousman v. Wisconsin & Lake Superior Mining & Smelting Co.*, 40 Wis., 418, which was an action by a stockholder to require the defendant corporation to either issue to plaintiff new stock proportionate to his old stock or to cancel one-half of the stock and certificates issued and delivered to other stockholders, wherein the court simply ordered the corporation to issue the proper amount of full paid stock to the non-assenting stock-

holder so as to make his stock bear the same proportion to the new stock as it did to the old.

A court is not bound to confine itself to grant or refuse to grant the relief prayed for. The prayer forms no part of the petition. If the facts show that the plaintiff is entitled to relief, the court will grant him such relief as the facts may show he is entitled to, notwithstanding it is not precisely the relief that he asks for. This principle has been affirmed many times in this state. *Bloch et al v. Koch*, 1 Bulletin, 91; affirmed without report 29 Ohio St., 565; *Ryan v. O'Connor*, 41 Ohio St., 368; *Moore v. Ogden*, 35 Ohio St., 430; *Coffinberry v. Oil Co.*, 68 Ohio St., 488; and Section 11583 of the Code authorizes the court to grant such relief as the justice of the case may require.

Now, all the other stockholders are not here claiming any relief. They have given away their property. This they had a perfect right to do. As the court said in *Stokes v. Continental Trust Co.*, 186 N. Y., 285, at page 298:

"The other stockholders could give their property to Blair & Co., but they could not give his. A share of stock is a share in the power to increase the stock, and belongs to the stockholders the same as the stock itself."

Therefore, the court, in conclusion, finds that the plaintiffs are entitled to have delivered to them certificates of the increased stock of the Stacey Manufacturing Company in proportion to their respective shares of the old stock and that the said defendant, James E. Stacey, should deliver to the Stacey Manufacturing Company, out of the seven hundred and fifty shares heretofore issued to him, that proportion of the said issue that under the findings of the court would belong to the plaintiffs in this case, and the court will make such further orders as are necessary in order to carry into effect the conclusions that the court has reached in this matter.

In conclusion, I want to express my thanks to counsel for the very able and exhaustive briefs they have submitted to me on the various propositions of law involved in this case and to apologize for the somewhat long delay in deciding this cause, which was due largely to the fact that the court read all of the authori-

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ties submitted, re-read many of them, and read many authorities that came to his attention through independent research. While the court expressed at various times some regret that this matter was in court at all, owing to the possible future consequences to a long established and well conducted business that might result from the prosecution of an action of this kind, still, when a matter is presented to the court it is to be determined on the respective rights and equities of the parties in the matter and not upon the court's opinion as to their good judgment or common sense.

Counsel will confer with the court with reference to preparing a decree in this matter and a decree in conformity with the findings of the court will thereafter be entered.

PRESCRIPTIVE RIGHT TO THE USE OF A WAY.

Common Pleas Court of Franklin County.

EVA A. FITZGERALD V. EDWARD G. BRENAMAN.

Decided, 1915.

Easement—Right-of-Way Claimed by Prescription—Upon What an Easement Based upon Prescription Rests—Trespass May Ripen into Title by Prescription—Presumption as to Knowledge by the Owner of Use—Prescriptive Right Distinguished from a Right Resting upon Uninterrupted Use—Injunction.

1. An easement by right of prescription rests upon a use and enjoyment, inconsistent with, and in derogation of an exercise of absolute dominion and control by the owner of the fee. To assert a right by prescription is to make a claim of defensive right rather than one of ownership.
2. A trespass if persisted in by an open, notorious, uninterrupted, adverse use, under a claim of right for the statutory period will ripen into title by prescription.
3. A presumption of law arises that an owner having either actual knowledge of a use, or who has constructive knowledge from open, visible use, and allows it to continue without let or hindrance for the statutory period of time, confers a right on the possessor or

user to the extent of his use, which can not be overcome by proof of no grant.

4. There is a distinction between a prescriptive right arising from adverse use of an easement, and a use springing from uninterrupted, continuous use of land. A right-of-way by prescription rests upon uninterrupted use for twenty-one years by analogy to the statute of limitations, and not upon the fiction of a grant.
5. Where a right-of-way over a servient estate is open and visible to the owner thereof, so that under all the facts and circumstances its continuous use may become known to the owner, constructive notice and knowledge is then chargeable to him.
6. So where an existing right-of-way over the lands of a grantor is yielded in consideration of an oral grant by the grantee of another right-of-way over the land of the latter, and such substituted right-of-way is used openly continuously without let or hindrance by all owners in succession for twenty-one years, a prescriptive right of title arises. Use of such right-of-way in such manner and in such way as to constructively disclose to the owner that it was used as a matter of right, for a period of twenty-one years beyond the time it was used and enjoyed under the privilege of the original grantee, charges the servient owner with knowledge of the adverse use and gives rise to a prescriptive right and title.

J. D. Karns, for plaintiff.

M. E. Thrailkill, for defendant.

KINKEAD, J.

Plaintiff as an owner of a farm, claims a right-of-way by prescription over a farm owned by defendant, and seeks to restrain the latter from interference therewith. Plaintiff owns two tracts which are located off from the public highways. She has one outlet by means of a ford across a creek to Central College. During certain seasons of the year this is difficult of passage. When the stream is up it is well nigh impossible, if not altogether so; it is also difficult of passage by heavily loaded wagons on account of large boulders in the bed of the stream. During certain seasons the evidence discloses that threshing machines, wagons loaded with hay and other farm products could not be taken out across the creek, but always had to go out through the right-of-way in controversy.

Mr. Geigle, prior to 1883, was the owner of the two tracts now owned by plaintiff, as well as of another tract adjacent

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thereto, consisting of 57 acres, which fronted on the Granville road at the south end of it. Mr. Geigele, and previous owners thereof, had a right-of-way to the Granville road along the east side of the 57 acre tract. W. A. Dill owned a 200 acre farm lying immediately east of the 57 acre tract which also fronted on Granville road. On April 17, 1882, Dill purchased from Geigele the 57 acre tract. As part consideration they made an oral agreement contemporaneous with the grant, that Geigele should abandon the right-of-way along the east side of the 57 acre tract leading to the Granville road, and in lieu thereof Dill agreed to grant Geigele a right-of-way from the 20 acre tract of the latter out through the 200 acre tract of Dill connecting up with a lane on the latter land leading out to the Granville road. This new way was opened up and was used by Geigele and his tenants from April, 1882, to May 7, 1888, when Green became the purchaser. Dill executed a mortgage to Dr. C. G. Green August 21, 1884, which contained no mention or reservation of the right-of-way orally granted by Dill to Geigele. The mortgage was foreclosed and Green became the purchaser May 7, 1888, at a judicial sale.

The evidence is clear and convincing that the right-of-way over the Dill-Green property was openly and continuously used by all owners and occupiers of the "Geigele tract," the 57 and 20 acre tract from 1882, the time of the oral or implied grant, and from May 7, 1888, when Green became the purchaser without let or hindrance, up until Brenaman, the present owner, came into possession, which was September 17, 1913. Brenaman was made acquainted with the claim of right asserted by plaintiff by direct communication by her to him before he took title. He is not therefore an innocent purchaser, but evidently bought in reliance upon the warranty. Dr. Green sold the "Dill 200 acre tract" to the Abernathys on December 23, 1910, giving them a warranty deed. The Abernathys conveyed the property by deed of general warranty to Brenaman. So the legal responsibility arising out of the claim to the right-of-way asserted by plaintiff rests upon Green.

Dr. Green was not a resident of this county during any period of his ownership, but resided in Woodbury, N. J., during

all the time. The Geigele tract was owned by Roberts Brothers before the plaintiff became the owner on August 24, 1908.

The evidence is clear and convincing that the right-of-way was a clear and definite course from the beginning to the present time; that there was at no time no material deviation therefrom except slight departures at times to avoid fallen trees or mud-holes. The evidence is clear that the road was repaired at times by the users thereof, by putting in and repairing a small bridge, and by making other repairs. The mail box of the occupiers was kept down at the entry to the lane in the Dill-Green tract at the Granville road.

There was evidence offered by defendant of other roads on the Green farm used by others and for other purposes, and tending to show that the land was overrun by people in general. But this in no wise destroys the effect of the evidence offered on behalf of plaintiff. The evidence shows that the road was openly and continuously used by all the owners and occupiers of the Geigele tract without let or hindrance for a period of 21 years from the time Green became the owner, May 7, 1888, up to the time Abernathy Brothers became the owners on December 23, 1910, as well as up to the date when Abernathy Brothers conveyed to Brenaman, September 17, 1913, a period of twenty-five years.

I say it was used during that period without let or hindrance. To be specific, neither Green nor any of his agents, nor the Abernathy Brothers granted permission to use the road or made any objection to its use.

The user was by Geigele and his heirs, and the subsequent grantees. The heirs of Geigele conveyed to Leon Smith January 22, 1906, who conveyed to Mathew S. and B. M. Roberts January 27, 1906. The Roberts Brothers conveyed to plaintiff August 24, 1908. The evidence shows that each and all of the above owners and occupants used the road without let or hindrance up until Brenaman became the owner September 17, 1913, who undertook to stop the use, and this action was brought October 1, 1913.

It was sought to be shown in evidence that the owners and representatives of the Green tract had personal knowledge of

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the use of the road, and made no objections. Dr. Green visited the farm only once or twice and did not disclose actual knowledge of the use. He had as agents Mr. Huffman, Mr. Burdell, and Mr. Thrailkill. Mr. J. B. McDonald testified, without objection, that he acted as agent in 1898 and for four years thereafter; that he put up fences, and had knowledge of the right-of-way and its use while owned by Geigele. Mr. Green testifies that if he acted as such agent it was under authority given by his agent. Green does not deny his agency as claimed by counsel.

Mr. Thrailkill became agent for Green in 1901 or 1902. The evidence shows that he was perfectly familiar with the lay of the Geigele tract and the Green farm; that he knew of the roadway, but he would not admit that he had personal knowledge of the use of the road by the occupiers of the Geigele tracts. He was on the farm many times, hunted on it, picked blackberries, knew who occupied the Geigele tract, and the right-of-way was perfectly open and visible to him, and actual knowledge of the use was clearly accessible but he would not admit the user. He was legal counsel for Dr. Green and looked after the conveyance to the Abernathy Brothers. The subject of the legal right to use the right-of-way in controversy was considered by him when the sale was made to Abernathys, and Mr. Thrailkill stated that Green would give them a warranty deed. This implies knowledge of a user of the road. The facts and circumstances known by him as agent for Green required and demanded inquiry and consideration by him, and it became the duty also of the Abernathys to investigate the facts. They went over the farm, became personally advised as to the roadway, visited the plaintiff and stayed all night at her house, and then took the conveyance with this knowledge, and never made any objection. The right to use the road was asserted by plaintiff direct to Abernathy Brothers, but still they made no objection or hindrance. They had knowledge of repairs of the road, and of the building of a new bridge by plaintiff at the Granville road following a flood. They had knowledge of the location of plaintiff's mail box at the Granville road, but offered no objections, and made no hindrance.

But the law does not require that a user under claim of right shall personally assert his claim to the owner of the servient estate. Nor does it require that the owner shall be made specifically acquainted with the nature and extent of the claim of right. In other words, it is not necessary to show actual knowledge of the claim of right. Constructive knowledge may be sufficient; that is if the use is open, continuous, and under such circumstances and conditions that it may be plainly visible to the owner of the servient estate, then the law will attribute knowledge to him.

It is to be presumed that an owner of real estate shall always be mindful of his own rights; that he shall always be on guard to learn and know of any infringement upon his rights, or any improper use of, or trespass upon his property. If he does not; if, without express consent, with knowledge, actual or constructive, he permits another to use his land without let or hindrance, for such length of time that the law will presume a grant, he can not be held to complain. Nor can he complain if a mistake is made concerning his legal rights touching the legal aspect of a use of which he has actual or constructive knowledge. This is the hard and fast rule of the law. There is apparent difficulty concerning the subject of "adverse possession." A general notion prevails that to constitute adverse possession, actual knowledge of the claim of the user must be brought home to the owner of the servient estate. But such a view can not obtain if careful study of the question and discrimination is exercised.

It is probably not as true now, as when an English judge stated years ago that:

"The doctrine of adverse possession, until very lately, constituted and perhaps still constitutes one of the least settled, although most important heads of the English law." Smith's Leading Cases Notes to *Taylor v. Horde*, 1 Burr, 60, quoted 60 O. S., 83.

A careful reading of the many decisions in this country will disclose a lack of appreciation of the law, as well as want of precise knowledge of the legal rules concerning this important

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topic of the law. The suggestion of Lord Mansfield of long ago, is pertinent to the discussion, to the effect that "the more we read, unless we are very careful to distinguish, the more we shall be confounded." Quoted in 60 O. S., 83. But there is no difficulty or confusion concerning the rule of law touching this subject in Ohio. It is clearly and concisely settled in *Pavey v. Vance*, 56 O. S., 162. The essential elements of title by prescription are so well set forth in this decision, and are so conclusive of the questions of the present case, that we might well be content with resting our conclusion upon this case without further elucidation. This case properly understood and applied ought to clarify the mind, and dispel the confusion.

There is no trouble in distinguishing between a license and an easement. The former is a personal privilege by parol or in writing not in conformity to the statute of frauds, while an easement is an incident of a grant; it presupposes a grant, and is implied therefrom. Under certain circumstances it is to be implied that the grant would not have been made unless it was intended to likewise grant the right or easement the enjoyment of which is essential or necessary to the use or grant.

The easement may be implied in favor of either the grantor or grantee according to the character or nature of use to be impliedly granted. When it is implied in favor of the grantee it is presumed to have been the intent of the grant that such grantee was to exercise an easement essential to full enjoyment of the subject of the grant. When the easement is in favor of the grantor it is to be presumed that he would not have made the grant, unless it was intended that the right or use was to have been reserved in him, and was essential to full enjoyment of his own property or that which he retained.

But an easement may arise or be presumed without an express grant. It may arise by prescription or presumption of fictitious grant, from long continued possession by analogy to the statute of limitation.

As stated, the general conception of an easement is that it is appurtenant to a grant, arising by implication and because the privilege or right is essential to full enjoyment of property granted, embracing only such rights as may be directly neces-

sary to the proper enjoyment of lands. *Ogden v. Jennings*, 62 N. Y., 526.

An easement by right of prescription rests upon a use and enjoyment which is inconsistent with, and in derogation of an exercise of absolute dominion and control by one claiming as owner. To assert a right by prescription is to make a claim of defensive right rather than one of ownership. A trespass if persisted in by an open, notorious, uninterrupted, adverse use, under a claim of right for the statutory period will ripen into title by prescription. A presumption of law arises that an owner who has either actual knowledge of a use, or who is held to have constructive knowledge from an open, visible use, and allows it to continue without let or hindrance for the statutory period of time, confers a right on the possessor or user to the extent of his use. Such right may not be overcome by proof of no grant. He may contradict it only by explaining the facts, but he may not overcome it by denial. 14 Cyc., 1147; *Sibley v. Ellis*, 11 Gray, 47; *Barnes v. Haines*, 13 Gray. Roads by prescription rest upon uninterrupted adverse user for 21 years in analogy to the statute of limitations, and not upon the fiction of a grant. *In re Krievers Private Road*, 73 Pa. St., 109.

There is a marked distinction between the uninterrupted, continuous use and possession of land—the physical property—where title is claimed, and the adverse use of an easement. The presumption arising from the uninterrupted use of a right-of-way is quite unlike a claim of title to land by adverse possession. Where land is physically held, possessed and occupied, to the exclusion of the owner long enough to give title by prescription, the owner is disseized and the title becomes complete in the adverse possessor. A mere verbal protest against the occupancy without an actual entry, or by action brought, is without avail, because the owner in such case is still disseized.

In the case of an easement, however, the adverse use thereof rests upon a different basis entirely. The owner of the premises on which the easement is claimed remains in possession of the physical thing—the land, while his acquiescence in the adverse use of the right-of-way, or the use “without let or hindrance,” irregardless of a grant—in fact without one—ripens into a title.

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by prescription. 14 Cyc., 1147; *Powell v. Bagg*, 8 Gray, 441; 69 Am. Dec., 262.

The maxim laying at the foundation of the rule had its origin in the civil law and was found in Bracton lib. 2, C. 23, Sec. 1:

"An easement in the land of another can be acquired by adverse user only, with the acquiescence of the owner of the land in its exercise under a claim of right *per patientium veri domini, cui scivit et non prohibuit, sed permisit de consensu tacito.*" *Powell v. Bagg*, *supra*.

If, before the lapse of time, the owner of the land, by verbal act resists the exercise of the right, and denies its existence, the presumption of the grant is rebutted, and his acquiescence in the right claimed is disproved.

Keeping in mind the pointed distinction between title to land by prescription, and easements by prescription, the constituent elements or fundamentals of title by adverse possession will be considered.

This can best be done by a careful study and analysis of *Pavey v. Vance*, 56 O. S., 162, which is the rule of property in this state.

The following essentials are drawn from this decision:

1. Prescription by civil law was not regarded so much as a source of title, as it was as a means of defense.
2. The substance of the title is the use and enjoyment of the easement for the requisite period.
3. There must be proof that the use was adverse to the owner of the land.
4. It must be used under a claim of right.
5. It must cover the period of time specified by the statute.
6. An adverse use is not consistent with possession under a license or permission. It must be without let or hindrance.
7. The use made and the mode of enjoyment determines the right.
8. It is not necessary that the party using the way verbally assert the right to do so, or bring to the actual knowledge of the owner of the servient estate his claim of right.
9. A use of a right-of-way over the farm of another "when it prevents the owner from cultivating it, or from making any

use of it inconsistent with the right-of-way, is adverse."

10. A use is "under a claim of right," where it is "used without 'let or hindrance' and without asking leave." "This may appear from conduct as well as words; using a way without asking leave imports a claim of right to do so."

11. "It is a general rule that the enjoyment of one's own land through that of another, without let or hindrance, for twenty-five years" confers upon the user "a right by prescription to continue the use as an incident to his own land, and which will pass by conveyance."

The doctrine and rules of the *Pavey v. Vance* decision above set forth are clearly applicable to this case and must be controlling in this case.

The important essential in this case, not conceived by counsel, is that where a right-of-way over a servient estate is open and visible to the owner thereof, so that by reason of all the facts and circumstances it may become readily known to the owner that the road was used, and by whom, and under what necessity it was used, constructive notice and knowledge is then chargeable to such owner. If the existence of the easement is apparent or discoverable upon examination this is equivalent to actual notice (*Willoughby v. Brown*, 226 Ill., 590; 117 Am. St., 213). This road or right-of-way was apparent to and readily discoverable by the owners of the Green farm.

"A party assuming and exercising a right of way openly, notoriously and continuously, without asking the consent of the owner of the land, and without manifesting in any way that he is exercising the right as a favor or license given him by the owner of the soil, must be considered as holding adversely." *Chollar-P. Mining Co. v. Kennedy*, 3 Nev., 361; 93 Am. Dec., 409.

"If the user of a right-of-way is of such nature and takes place at such intervals as to afford an indication to the owner of the servient tenement that a right is claimed against him, it will be sufficient. The use of such way whenever one sees fit and without asking leave is deemed continuous and adverse." 14 Cyc., 1156.

The facts in this case come clearly within the rules stated in the last two above named authorities. The persons using

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the road from the time Green became the owner did not in any wise manifest that the owners of the dominant estate were using it as a favor or license. It was used at such intervals as to afford an indication that it was used as a matter of right.

Without regard to the fact that there was either a reservation or an oral grant at the beginning of the user, the fact is that there was a user for twenty-one years from the time Green became the owner for the prescription period.

Geigele said: "I will not sell the 57 acre tract without reserving the right-of-way existing thereon." Dill said: "I will not buy it that way, but I will give you a right over my farm instead."

If the way which Geigele had over his 57 acre tract was a way of necessity, it is to be implied that he would not make the grant without reserving a right-of-way, either the one he had, or a substituted one. If the right-of-way and its user was readily apparent to any one becoming an owner of the Dill property, who must be constructively charged with notice and knowledge of the way, and of the necessity thereof to the owner of the Geigele-Fitzgerald tract, he is chargeable therewith.

Where a way is one of necessity this fact constitutes notice to a purchaser of the existence of the easement (*Ellis v. Bassett*, 128 Ind., 118; 25 Am. St., 421). An existing way is part of the realty, and passes by a conveyance (64 N. H., 500; 88 Ky., 185; 82 Me., 438). Where an owner of an estate imposes upon it an apparent and obvious servitude in favor of another, and at the time of the severance of ownership such servitude is in use, and is reasonably necessary for the fair enjoyment of the other, then whether the severance is by voluntary alienation or by judicial proceedings, the use is continued by operation of law. *Ellis v. Bassett*, 128 Ind., 421; 25 Am. St., 421.

I am inclined to the opinion that the right-of-way which Geigele had through the 57 acre tract to the Granville road was a road of necessity.

A way of necessity has been held not to mean that there must exist an absolute physical impossibility of having an outlet in another manner. Where a way exists, but can not be utilized at all times and under all conditions and circumstances

without unreasonable labor and expense, an easement is sometimes recognized. *Smith v. Griffin*, 14 Colo., 429; *Pettingill v. Porter*, 8 Allen, 6; 85 Am. Dec., 676; *Galloway v. Bonesteell*, 65 Wis., 79; 56 Am. Rep., 616; see note to Am. Ann. Cas. 1913 C., p. 1114. See note 36 Am. St., 416; 134 Am. St., 735.

There is sharp difference of opinion concerning the creation of an easement by necessity as to the degree thereof. A glance at the note to *Powers v. Hefferman*, 122 Am. St., 206, on page 211, will disclose that many decisions hold that a strict necessity is essential to give rise to any easement by necessity. It there also appears that some authorities regard a reasonable necessity as a sufficient basis for a way of necessity, citing *Oliver v. Pitman*, 98 Mass., 46; *Hollenbeck v. McDonald*, 112 Mass., 247; *Goodall v. Godfrey*, 53 Vt., 219; 38 Am. Rep., 671. See also instructive case and note *Blossmeyer v. Jablonsky*, 241 Mo., 681; Ann. Cas. 1913 C., p. 1104.

A mere convenience, however great, it is urged in the greater number of cases, is not enough; it is necessity, not inconvenience, that gives the way. See note to 85 Am. Dec., 676, also note to 122 Am. St., 211. If one has an outlet over his own land, although less convenient, he can not claim a right over the premises of another (74 Ala., 374; 62 Md., 462; 73 Vt., 375). If he can construct a road over his own land with reasonable expense a way of necessity can not ordinarily be implied. In short, it is said, ways of necessity do not exist when there are reasonably practicable ways of ingress and egress. Note to 122 Am. St., 211, and cases cited. It appears that a permanent way at all seasons of the year and for all purposes in the reasonable enjoyment of the farm may not be constructed without unreasonable expense.

The rule of *reasonable necessity* as the basis of implied right to an easement is the one adopted in this state in *Baker v. Rice*, 56 O. S., 463; *Meek v. Breckenridge*, 29 O. S., 642; *Meredith v. Frank*, 56 O. S., 479; *Jordan v. Breece Mfg. Co.*, 89 O. S., 311.

If at the time of the grant by Geigele to Dill there was a reasonable necessity for a right-of-way to the Granville road, because it was well nigh impossible to pass out over the ford in the creek at certain seasons and with certain kinds of loads.

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threshing machines and the like, then it may well be concluded that the "agreement to exchange the passage way * * * for another * * * does not evidence a permissive use of the way, but is persuasive of an intention to surrender one in consideration of another way being granted." *Bright v. Dunn*, 12 Ky. L. Rep., 689.

Regarding the existing right-of-way as one of reasonable necessity which I believe to be warranted by the facts and circumstances and the law, as suggested by *Bright v. Dunn*, *supra*, it does not bring it under the doctrine of a license, but it may well be concluded that there was an intent on the part of both grantor and grantee that a like way of necessity was to be granted.

I have thus carefully considered this question because it was strongly urged upon the court and because it presents the question in a novel and unusual way, and might warrant the formulation of a new form of the rule if it be vital to the decision. It presents a strong equity, and adds material weight to the claim of right asserted by plaintiff.

An easement can not be created by parol. But when a right is given by parol agreement, as it was in this case, which is exercised as against subsequent owners, under claim of right it becomes adverse. Such use of a right-of-way may ripen into a perfect title if it is exercised under a claim of right for the period prescribed by the statute of limitations. See *Stearns v. Janes*, 12 Allen, 582; *Barbor v. Pierce*, 42 Cal., 657; *McKenzie v. Elliott*, 134 Ill., 156.

The fact that a right asserted as an easement originated in parol permission, does not affect the prescription title, if it has been used for the requisite period under a claim of right. *Coun-ton v. Seufert*, 23 Ore., 548.

In *Ashley v. Ashley*, 4 Gray, 197, it was held:

"Evidence that the grantee, at the time of receiving a deed of land, agreed by parol that the grantor might continue to exercise a right-of-way over the land, not reserved in the deed, is admissible for the purpose of showing that the grantor's subsequent possession of such easement for twenty years under a claim of right. (Syl.)

"The evidence had a tendency to show that the plaintiff used the way openly as of right, against the owner of the soil, and

so was adverse, and this was one of the elements for establishing the easement by prescription. This principle is, that possession under a claim of title, with or without deed, is adverse; and that principle applies as well in case of easements, etc., as to title in land." *Ashley v. Ashley*, 4 Gray, 197.

If the use of a way is under a parol consent given by the owner of the servient tenement to use it as if it were legally conveyed it is a use as of right (*Stearns v. Jones*, 12 Allen, 582). So an occupation of land under parol gift from the owner is an occupation as of right (*Sumner v. Stevens*, 6 Md., 337). The character of the use depends upon the language used and the manner of the enjoyment. If the language is such as to create only a license or lease, the enjoyment is regarded as permissive, and not as of right. *Cheever v. Pearson*, 16 Pick., 266.

The transaction between Geigele and Dill being more nearly like a reservation or implied grant of necessity, rather than a license, it may well furnish the basis of a claim of right, if not an implied grant because a reasonable necessity.

More than ordinary care and attention has been given this case because the question is important as a rule of property. I have merely followed the law as settled by the decision of last resort applicable to this case, and have endeavored to more fully elucidate and set forth the law of easements by prescription.

The finding and decree is in favor of the plaintiff, decreeing title by prescription in her to the right-of-way.

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**PROPERTY IN PROCESSES REQUIRING EXPERIENCE, SKILL
AND KNOWLEDGE.**

Common Pleas Court of Cuyahoga County.

THE CLEVELAND WORM & GEAR CO. v. MAYHEW E. NOYES.

Decided, May, 1915.

Trade Secrets—Involved in the Art of Making Worm Gear Drives—Processes of Manufacture May be Clothed with Property Rights—Knowledge Obtained in Practice—Distinguished from that Derived from the Books or Possessed by Technical Experts—Employees Under Obligation to Treat Such Knowledge as Held in Trust—Bound by an Implied Contract Not to Use Such Knowledge to the Injury of their Employers.

A shop foreman, who while so employed has obtained an intimate knowledge of a superior manufacturing process, upon leaving such employment may be enjoined from promoting a competing company or using his knowledge so obtained, or drawings pertaining to such process which came into his possession, in connection with a competing business; but he can not be enjoined from obtaining a patent on a mechanism used in such process, application for which he already has on file.

White, Johnson, Cannon & Neff, for plaintiff.

Francis J. Wing, contra.

FORAN, J.

In this case the plaintiff asks for an injunction and the appointment of a receiver. In brief, the claims of the plaintiff are, that it is a corporation organized under the laws of Ohio, located at Cleveland and engaged in the business of manufacturing worm gear drives for the propulsion of automobiles and motor vehicles of the tractor and pleasure type; that it has been engaged in this business for several years, and has built up a large, profitable and constantly increasing business. That the worm gear drive is an efficient and mechanical method of applying power, or for the transmission of power, and is gradually coming into greater use and rapidly displacing other methods of

power transmission in or for such vehicles; and that about January 8, 1914, the defendant, Mayhew E. Noyes, was employed by the plaintiff as shop foreman, and continued as such shop foreman until March 13, 1915, when he was discharged by the plaintiff for alleged misconduct in permitting strangers to come into the factory and view its operations, and in making copies of important and valuable data belonging to the plaintiff, and abstracting other papers of like import. The plaintiff further claims that its superintendent, David Fitzpatrick, and a corps of engineers and assistants, through long years of practical experience, by repeated experiments and knowledge gained from numerous failures and successes, finally perfected methods and processes which enabled the plaintiff to manufacture worm gear drives of unequalled and unrivaled excellence and efficiency, adapted to all kinds of motor vehicles and all conditions of topography, load and speed; that these methods and processes are peculiar to the plaintiff's business, are to a large extent secret in the broad sense that they are kept from the knowledge of others and concealed from the notice of all except the person directly charged with the special confidence of the plaintiff, and under strict obligations of responsibility to it.

There is no claim that the methods, processes, workmanship or modes of construction of worm gear drives by the plaintiff are in any sense esoteric, occult or mysterious; but the plaintiff, it is claimed, by its experimentation, long experience and observation, has acquired and is possessed of mechanical and engineering principles by the application of which the difficulties and defects of worm gear drive power transmission are practically solved; and that this knowledge enables it to successfully compete in the open market with all other manufacturers of such means of power transmission for motor vehicles. Its complaint against the defendant, briefly stated, is, that the defendant was employed by it as its foreman, and that in the course of his employment he necessarily became acquainted with certain things the keeping secret of which was important and valuable to the plaintiff; that is, that by reason of his employment, he became acquainted with the modes and methods used and

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adopted by the plaintiff in the construction of worm gear drives; that he was about to make use of these for his own advantage; that the specific things which it is claimed the defendant appropriated and took from the plaintiff are: a list and description of hobs used for cutting worm gear wheels; a list and description of cutters used in cutting hobs and the worms of such worm gear drives; data sheets given to him as foreman and containing instructions how to manufacture hobs and how to use hobs and cutters in the manufacture of worm gear drives; blue prints which were used for the same purpose, as well as information as to the names and addresses of persons and corporations for which worm gear drives were designed and manufactured by the plaintiff; and also particulars and details as to a worm-grinding machine invented by the plaintiff's superintendent, the claim being that the invention belongs to the plaintiff, which it is said the defendant had been employed to assist in constructing while in the plaintiff's employment.

A temporary restraining order was granted by Pearson, J., March 30, 1915. The matter is now before the court on motion to dissolve that restraining order. The defendant has filed no answer. It is admitted that he was foreman, as claimed in the plaintiff's petition, that he made a list and description of the hobs, which he offers to return. He admits that he intends to form a company to compete with the plaintiff in the manufacture of worm gear drives, and that he has made arrangements for so doing, which he proposes to carry into effect. He admits, or rather claims, that he has made certain improvements in the machine used for the grinding of worms, and that he has already applied for a patent on this device, claiming that it belongs to him. He does not deny that he has acquired certain knowledge while in the employment of the plaintiff which may enable him to better do as he proposes to do, that is, to manufacture worm gear drives in competition with the plaintiff; but he claims that such knowledge is not a secret, but with the information contained in books and the general knowledge of expert mechanics applied to what is contained in books, and technical magazines, successful and serviceable commercial worm gear drives can be manufactured by any expert engineering mechanic.

We think it would be a waste of time, if the court had the time, to give even a summary of the evidence introduced during the trial, which occupied some six or seven days. The record is very voluminous, the inquiry taking a very wide range, much of the testimony being wholly immaterial and throwing but little light upon the main issues involved. We feel that it is only necessary to the inquiry before us to state the conclusions which we believe the testimony has conclusively established.

The work of Hugh Kerr Thomas, introduced in evidence, furnishes this definition:

"A worm gear may be defined as a spur wheel which is rotated by an endless rack, the teeth of which are successively pressed against the teeth of the wheel. By making the rack teeth in the form of a spiral and rotating it upon its axis, sloping the wheel teeth to a corresponding angle, the effect of an infinitely long rack is obtained."

A rack of this kind is called a parallel worm. The author further says:

"By revolving the worm wheel, the teeth of the rack may be caused to move along, that is to say, the worm will itself commence to rotate, the relative motions being thus convertible."

The principle itself is very old, harking back to Archimedes, who died 212 B. C.; but no one will claim that its possibilities, uses and adaptations have not been tremendously enlarged. The testimony seems to clearly indicate that it is a well-known principle of mechanics that helical teeth and worm transmission of force increases smoothness of motion, especially in motor vehicles; but smoothness of motion requires difficult and expensive workmanship. Helical teeth are open to the objection that they exert a laterally oblique pressure, which tends to increase resistance and strain machinery. To minimize this laterally oblique pressure and decrease resistance and strain requires very skilful workmanship and nice discrimination and close care and attention to mechanical details; and this is more particularly true where high speed and smoothness of motion are

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desired. When it is sought to transmit force and motion from a prime mover through the train of mechanism to the working parts of a machine, so that the motion and force through the transmission may be so modified in amount and direction as to be rendered suitable for the purpose to which they are to be applied, frictional strain and resistance are large factors to be taken into consideration in attaining high efficiency. This is particularly true in the application of complex or helical motion, for here there is a combination of translation and rotation. The movement can not be said to be merely rotational, when there is translation or advance perpendicular to the plane and parallel to the axis of rotation. We think that no one will deny that greater skill, finer adjustment and closer attention to details are required in sliding contact than in rolling contact, such as belts, pulleys and band-wheels; and of all sliding contact motion, the helical being the most complex, skill and experience are factors upon which efficiency absolutely depends. If the rate of absorption of energy by a machine nearly equalled the rate at which it was produced by the prime mover, the problem of power transmission would be solved; but in the nature of things this end can never be fully accomplished, for a certain quantity of energy produced by the prime mover is necessarily absorbed by the transmitting mechanism itself for the purpose of overcoming frictional and other resistance, such as lateral oblique pressure in worm gear drives. To reduce to a minimum the quantity of energy absorbed by the transmitting mechanism and obtain the highest possible efficiency, both as to speed and load, was the problem that confronted mechanical engineers in the application of worm gear drives to motor vehicle propulsion.

If the testimony in this case is to be believed, they have successfully solved the problem and reached the zero of absorption of energy by the transmitting mechanism. It appears in evidence that before pioneers in this field began to apply the principle of the worm gear to motor vehicles, the quantity of absorption of energy by such gears was over 50% of the energy produced by the prime mover, and this has been reduced to less than 3%. It is quite evident that such far-reaching results

could only be attained by long years of experience and large expenditure of money. Success was secured through experimentation and at the expense of repeated failures. All knowledge is the result of observation and experience. We gain cognition of a fact or truth by actual experience. An idea is a conception of something desired; an abstract principle of no practical consequence until established by evidence or tested by observation. Experiment subjects the thing or the object suggested by the idea to certain conditions, and by observing the result attained something new may be discovered. The manufacturers of worm gear drives for motor vehicle propulsion, through technically trained engineers, have for over ten years been subjecting these worms and gears to many varying conditions, and by observing the results have tested ideas that were suggested by repeated failures, until all the efficiency claimed has been attained. It would be sheer nonsense to say that a professor in a technicological school of admittedly large theoretical knowledge of the principles involved in worm gears as applied to power transmission, but of no practical shop experience, could produce the same results that can be produced by an engineer whose knowledge has been acquired by long years of practical experience with or in the construction of such gears for motor vehicle propulsion. The same is equally true of the man or engineer whose experience with such gears is limited to their use in devices or machines other than motor vehicles.

After fully, carefully and thoroughly considering all of the testimony, we can reach no other conclusion than that suggested.

In determining the questions under consideration, some general principles should be kept in view.

In automobiles or motor vehicles we have a combination of statics and kinetics. In most mechanical appliances the structure or form remains fixed or stationary. In motor vehicles the prime mover carries or moves the form or structure along a given path, and in designing the prime mover and the power transmission, the nature and character of the form or structure and the load it has to carry, as well as the topography of the country to be traversed, must be considered. A motor vehicle

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is designed to perform work, that is, to move against resistance, largely tractive; and hence the amount and character of the resistance, such as the topography, condition of streets or roads, and character of the locality where the vehicle is to be used, must also be taken into account and provided for. Again, while there may be several threads in the worm, and many teeth in the gear wheel, it must be remembered that each thread and tooth successively stand the stress and strain of the whole load.

The pitch of the screw, which is the distance between two successive turns of the same thread or helical projection measured parallel to its axis, should be the same as the pitch in the teeth of the gear wheel, if they are to work correctly and accurately together. It is, therefore, of the utmost importance that the threads and teeth do not grind or unduly bear upon each other at any point of contact. The proper clearance must be provided for with an exactness almost microscopical. If the surface of the metal come into grinding contact, heating takes place, and the threads of the screw and the teeth of the gear wheel are destroyed by friction. It is claimed that this is prevented by a film of oil, which, acting as a cushion, keeps the surfaces separated. This film of oil is so thin that it can not be accurately measured. It has been determined, however, that there can be no metallic contact, and that this oil cushion or film must reach and remain on or upon every part of pressure contact. It will therefore be readily seen that the character and viscosity of the lubricant is a matter of supreme importance, as is also the alloy or the material of which the gear wheel is made.

A glance through the text books on the subject of worm gear drives discloses the truth of the fact, as the American Machinists Gear Book aptly puts it, that "Many of us know things that are not so." We were convinced during the hearing that there are many things about gears and worm drives that the experts do not know, but that there is nothing connected with this subject which they can not attempt at least to explain. The testimony convinces us, however, that the plaintiff has acquired and accumulated a fund of knowledge and experience on this subject, possessed, perhaps, by no other person or cor-

poration in this or any other country. That this knowledge is an exceedingly valuable asset, in which it has a property right, can not be denied. By reason of his employment, the defendant, Noyes, occupied toward the plaintiff a position of trust and confidence which he is bound by both law and morals and common honesty to respect. He says, however, that there is no secret in the process or methods of the plaintiff in worm gear drive construction; and that, given a worm gear drive made by the plaintiff, he can duplicate the same without difficulty; and inasmuch as these drives are sold in the open market, any worm gear mechanician may obtain one or secure one from an abandoned or dismantled motor vehicle and make an exact duplicate of it which will be just as serviceable and efficient as the original.

This contention is not supported by the evidence, but, on the contrary, is clearly disproved by the weight of the evidence. Counsel for the defendant strenuously insists that his client is thoroughly experienced in the details and intricacies of worm gear drives, and that the plaintiff seeks to enjoin the use and operation of the natural law of ideas.

The testimony is quite clear that, before the defendant became connected with the plaintiff, his experience in worm gear mechanism as applied to motor vehicles was quite limited. We think counsel for defendant takes too broad a view of the contention of counsel for the plaintiff, who, as we understand it, do not seek to prevent the defendant from using ideas of his own, even if they were conceived and assumed tangible shape while he was in the employment of the plaintiff; but the plaintiff does seek to prevent the defendant from appropriating discoveries or secrets or results which were the realization of effort and experience on the part of the plaintiff and its agent before the defendant became its servant.

An idea, as Locke defines it, "is the object of the understanding when a man thinks;" or it may be said to be a concept which is the product of thinking, or the mental image, the immediate object of thought. These concepts, ideas or mental pictures, which are the result of a man's thought or cognition, springing from his own consciousness and experience, belong to him to use

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or make use of as he sees fit; but no man has a moral right, nor under certain circumstances has he a legal right, to appropriate ideas which another man has reduced to practice or embodied in some useful and distinct form.

Undoubtedly the defendant's knowledge of and experience with worm gear drive mechanism was greatly widened and broadened and his efficiency vastly improved by the opportunities afforded him during his service with the plaintiff. This experience and knowledge, as well as the ideas the result of his own thought, can not be taken from him, nor does the plaintiff seek to do so. The plaintiff specifically claims that this knowledge, as applied by it to pitch angles, diametrical pitch and circular pitch, addendum clearance, thickness of teeth, contact, outside diameter, oil film or cushion, and many other mechanical details in relation to these worm gear drives, have been reduced to concrete form in the shape of written data for each particular customer and each particular kind and variety of motor vehicle, and as adapted to the topography of the locality in which each is used: and that the defendant, by reason of his confidential and trust relationship to the plaintiff, wrongfully obtained possession of these data, as well as the names and addresses of its patrons or customers; and that he is about to associate himself with others to enter into competition with the plaintiff and use the knowledge thus acquired for the benefit of himself and others, and to the detriment and injury of the plaintiff.

We think this claim is fully established by the evidence; indeed the defendant does not, in many respects, expressly deny the claim, only insisting that the plaintiff never had any knowledge of worm gear drives or any methods or processes of their manufacture not known generally by manufacturers of this type of power transmission, and not found in public books and mechanical magazines on the subject; and that therefore he has a right to use not only the ideas the result of his own thought or cognition, but any ideas, details or improvements of construction originating with others; for he claims that the principle of worm gear drives is so ancient and so simple that there can not possibly be anything new or novel in connection with or in relation to it.

This contention loses sight of the fact of skill, accuracy, appropriateness, adaptation, and efficiency of workmanship and mechanical construction. This became quite evident during the trial. Counsel for the plaintiff, after the trial had been in progress but a short time, handed to the defendant data and material which had been furnished to him by an automobile manufacturer, from which it was desired to design a worm gear drive, and counsel asked the defendant if he could and would furnish the directions, as to details and data of all kinds, for manufacturing a worm gear drive to satisfy these requirements. The defendant answered he would, but day after day passed, and each morning he was asked if he had solved the problem or complied with the request, and the defendant was finally compelled to admit that he was unable to solve the problem or furnish the data or details required, from books or other general knowledge concerning worm gear drives known to mechanics generally. If the contention of the defendant is correct, it seems to the court that he should have been able to solve this problem, and that the fact that he failed to do so, and had to admit that he was unable to do so, is strong evidence that the contention of the plaintiff in respect to these matters is substantially correct.

It is said there once lived a man in a woods remote from the habitations of man, and to whose house or home there was no road or even a path; but because this man made a better mouse trap than anybody else, the public wore a beaten path to his door.

In former times, the shoemaker who could make a better boot than his fellows had the choice of the trade; nor could the less efficient man, by pulling apart the boot made by the more efficient mechanic, make a boot in all respects similar or as serviceable.

In skill and efficiency we always see evidences of the reasoning faculty, and the discrimination based upon practical knowledge, as well as occasional flashes of genius. But take the case of the skilful shoemaker: The excellence of his work may not have been wholly the result of manual dexterity. He may also have had a secret method of lasting, shrinking and stretching,

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which could be imparted to others, but which could not be derived from the most careful examination of his work.

About two hundred years ago Antonio Stradivari made violins at Cremona, Italy, that can not be duplicated and never have been. There are over fifty specimens of this man's workmanship still in existence, whose special advantage, whatever it was, has been lost irrecoverably. Violins of this make have been taken apart and microscopically studied, the proportions and details faithfully followed by the careful workmanship of skilled hands, but the quality of its tone, its soul or the heart of its mystery has never been reproduced or discovered. Some little detail of seasoning or varnishing, or some secret process of handling, has been lost and probably never will be found.

In *Tube Co. v. Tube Co.*, 29 O. C. C., 468 (3 C.C.[N.S.], 459), Donahue, J., defines a trade secret to be "a plan or process, tool, machanism or compound known only to its owner or those of his employees to whom it is necessary to confide it in order to apply it to the uses intended." There are other definitions of a trade secret, but this is sufficiently specific for our purpose.

The mechanism known as the worm gear drive is of course not a secret; but as between a number of such drives, that one may be more efficient and serviceable than the others admits of no doubt; and the process of making a more serviceable and efficient drive may well be secret or involve a series of secrets. Process in this connection means the actions, operations and methods of treatment applied to the construction of the screw or worm and the gear wheel and fitting it all to work synchronously so as to attain the most efficient result. In a word, it means the whole course of proceeding from the time the plan as conceived is drawn until the finished product is encased in the lubricant and placed in position for operation. Just what this secret is, or what the secrets are, it may be difficult from the evidence to state in precise words; it may be in that skilful and accurate workmanship which produces perfect synchronization between the different parts, or such as provides for a perfect oil film or cushion, or it may consist in a series of adaptations which produced the results established by the evidence.

Under all the circumstances detailed in the evidence, it appears clear to the court that the relation of trust and confidence existing between the plaintiff and defendant was of such a character as establishes an implied contract that the defendant would not do the things the evidence conclusively shows he has done and proposes to do.

Merryweather v. Moore, L. R. (1892), 2 Chancery Division, 518, is a case in point. It seems that two days before leaving the plaintiff's employ, the defendant compiled a table of dimensions of various types of fire engines made by the plaintiff, which dimensions the plaintiff claimed to be trade secrets. The defendant claimed that he prepared the table for his general information; and further, that all the information contained in the tables might be obtained by measuring up engines which had been sold by the plaintiff. Among other things the court said:

"I will put aside once for all any cases arising on express contract. Perhaps the real solution is that the confidence postulates an implied contract; that, where the court is satisfied of the existence of the confidential relation, then it at once infers or implies the contract arising from that confidential relation—a contract which thus calls into exercise the jurisdiction to which I have referred. * * *

"It may be that with care all these details might have been obtained by inspection of the different engines which were either at hand or available, perhaps, through working drawings, or otherwise; but in this particularly compendious form it is common ground that these materials did not exist. Mr. Moore considered it to be for his benefit that they should exist, and exist in his possession; and he must be taken, whatever he says, to have intended to use them for his own purposes. * *

"But the question is, is not this an abuse of the confidence necessarily existing between him and his employers—a confidence arising out of the mere fact of his employment, the confidence being shortly this, that the servant shall not use, except for the purposes of the service, the opportunities which that service gives him of gaining information."

There is much in this language that is quite applicable to the case before us.

In *Lamb v. Evans*, L. R. (1893), 1 Chancery Division, 218, at 226, the court say:

“What right has any agent to use materials obtained by him in the course of his employment and for his employer against the interest of that employer? I am not aware that he has any such right. Such a use is contrary to the relation which exists between principal and agent. It is contrary to the good faith of the employment, and good faith underlies the whole of an agent's obligation to his principal. * * * An employer gives to his agent by employing him the means of obtaining in his name and for the purposes of the contract certain materials and certain information which has been committed for the purposes of that contract to writing. It is intelligible that the bargain made between the principal and agent should be any other than one which implies that the agent, having obtained these materials and information under the cover of this agency, is not to turn around and use the materials against his employer as soon as the agency is determined.”

In *Little v. Gallas*, 4 N. Y. (App. Div.), 569, it is said:

“The law raises an implied contract that an employee who occupies a confidential relation towards his employer will not divulge any trade secrets imparted to him, or discovered by him in the course of his employment.”

See also to the same effect *1 High on Injunction*, Section 19; *1 Beach on Injunction*, Section 35.

The authorities that might be quoted in support of this proposition are almost innumerable.

It appears from the evidence that a cutter is a tool for cutting a worm or screw, and also for cutting the hob. The angle at which the cutter is placed in the machine determines the lead of the screw, as well as its general character, and the kind and character of hob which it is desired to make. A hob is a tool for cutting the teeth of the gear wheel. The character of the worm or screw depends, as has been said, upon the angle at which the cutter is set. The hob for each patron or customer of the plaintiff has a number; and the character and kind of cutter used for each of the plaintiff's patterns is also indicated as well as the number of the cutter. These hobs and cutters were kept in a vault or other secure place under lock and key; doubtless they were not available to anybody except upon an order from the

engineering department. When a shop order was given the defendant in his character as foreman, it contained certain data as to the number of the hob, cutter, circular pitch, pitch diameter, addendum, and other data from which the order could be filled or the worm gear drives made. The defendant kept this data in a memorandum book. This he admits. The blue prints and drawings which accompanied each shop order, or which were furnished the defendant for each new job or order, were also in his keeping, and it is claimed by the plaintiff that they disappeared at the time he left the plaintiff's employment or was discharged. The defendant admits that he obtained a list of the customers of the plaintiff from the shipping office. Having all this data, and knowing the names of the customers, the number of the hob and cutter, together with the drawings and blue prints, the information furnished by all this data is exceedingly valuable to the defendant if he be permitted to retain it.

It may be said, however, that defendant denies that he made a list or copy of cutters, although some of the plaintiff's witnesses insist that he did.

It seems that the blue prints and other data, such as shop orders, were in the defendant's desk during the time he was employed, and were kept there; and that a day or two after he left, and when these things were sought for by the agents of the plaintiff, they could not be found, although diligent search has been made for them.

Counsel for defendant relies largely upon the case of *National Tube Company v. Eastern Tube Company*, 23 O. C. C., 468, *supra*. In the second paragraph of the syllabus of this case it is said:

"The fact that the discoverer of a trade secret which he is using secretly communicates to an employee to better enable the latter to discharge his duties as such, does not authorize such employee to sell it in the market, nor to sell his services with the added value of the secret; but if the employee himself knew the idea, or brought the knowledge to his employer, the only property interest the employer can claim is the product of the skill, indus-

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try and intelligence of the workman. He does not own the idea."

With this doctrine there can possibly be no quarrel.

In this case it seems that the defendant was employed by the plaintiff, who claimed that during the term or course of his employment the plaintiff had perfected through various stages of evolution certain patterns that were strictly individual and distinct from the patterns of all other tool mills. That the defendant occupied toward it a confidential relation, and that he wrongfully, fraudulently and secretly took and carried away the patterns of the plaintiff, and had certain castings made for the use and benefit of another company; and that he could not have secured these patterns except by reason of his confidential employment.

The defendant, Nuttall, denied that the patterns were a trade secret, and avers that these and like patterns were in common use; that artisans or workmen in that line of business had full knowledge of the character of the machinery and of the patterns, and could easily and readily reproduce them.

During the trial one of the witnesses, in answer to a question with respect to these patterns, said it was a question of engaging a competent engineer and a man to do the work. The court in the opinion, page 472, say:

"That there was some care taken of these patterns, and some intention of keeping them from the public generally, there can be little doubt; but a trade secret, as we said a moment ago, is a secret known only to the owner or proprietor of it and such of his employees to whom it is necessary to communicate the secret in order that he may use them to advantage. It does not mean that when I employ a man who has skill, knowledge and experience in a particular line, and ask him to furnish me the knowledge, and employ him because of his knowledge and experience, and he then supplies me an article, or does for me that which his skill, knowledge and experience enable him to do, the idea or ideas he evolves become the property of the employer as a trade secret."

In other words, it seems in this case that the defendant, and perhaps other employees, evolved the idea or ideas embodied in

these patterns; and the court distinctly holds that, under such circumstances, the ideas do not become the property of the employer as a trade secret, for the court says the trade secret must be in the mind of the man who discovers it, and he must be using that secretly; and the communication to his employee must be made, if possible, as has been said, to better enable that employee to discharge his duties. Of course the employee, as the court in this case said has no right "to sell it in the market," or to sell his services in the market with the added value of that secret. But if the employee himself knew the thing, if he is the owner and brought the knowledge to the employer, the only property interest that the employer may claim is the product of the skill, industry and the intelligence of the workman.

In sharp contrast to this case is the case of *Tabor v. Hoffman*, 118 N. Y., 34. The plaintiff, Tabor, was a manufacturer of pumps, which were sold upon the market. He claimed to have a secret process of so doing, that is, in making the perfected pump, but did not obtain the protection of the patent laws; and the court say, page 35:

"As the plaintiff had placed the perfected pump upon the market without obtaining the protection of the patent laws, he thereby published that invention to the world and no longer had any exclusive property therein." Citing *Rees v. Pelzer*, 75 Ill., 475; 14 Fed., 728.

The court then proceeds to say:

"But the completed pump was not his only invention, for he had also discovered means, or machines in the forms of patterns, which greatly aided, if they were not indispensable, in the manufacture of the pumps. This discovery he did not intentionally publish, but had kept it secret, unless by disclosing the invention of the pump he had also disclosed the invention of the patterns by which the pump was made. * * * The pump consists of many different pieces, the most of which are made by running melted bars of iron and brass in a mold. The mold is formed by the use of the patterns, which exceed in number the separate parts of the pump, as some of them are divided into several sections. The different pieces out of which the pump is made are not of the same size as the corresponding patterns,

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owing to the shrinkage of the metal in cooling. In constructing patterns it is necessary to make allowance not only for shrinkage, which is greater in brass than in iron, but also for the expansion of the completed casting under different conditions of heat and cold, so that the different parts of the pump may properly fit together and adapt themselves, by nicely balanced expansion and contraction, to pumping either hot or cold liquids."

This is precisely the situation before us. In the *Tabor* case, taking the perfected or manufactured pump which was placed upon the market apart, a similar or precisely similar pump could not be reproduced, because of the conditions indicated by the court. The size of the patterns could not be discovered by merely using different sections of the pump, because of the shrinkage of metals, as indicated; and various changes had to be made if a perfected pump was to be built, and these changes could only be ascertained by a series of experiments involving the expenditure of both time and money; and this is precisely what is claimed in the case before the court.

Vann, J., in *Tabor v. Hoffman*, *supra*, said:

"Are not the size and shape of the patterns, therefore, a secret which the plaintiff has not published, and in which he still has exclusive property? Can it be truthfully said that this secret can be learned from the pump when experiments must be added to what can be learned from the pump before patterns of the proper size can be made?"

And it is frankly admitted in the case before us that to make a serviceable and efficient gear or worm gear drive, experimentation is absolutely essential, as there are many variable conditions under which the worm gear drive has to be used. In the *Tabor* case the court further said, speaking about a valuable medicine not protected by a patent:

"If one finds out the secret of the proprietor, he may use it to any extent that he desires without danger of interference by the courts. But, because this discovery may be possible by fair means, it would not justify a discovery by unfair means, such as the bribery of a clerk, who in course of his employment had aided in compounding the medicine, and had thus become familiar with the formula."

There can be no doubt, in fact it is conceded by every one that, independent of copyright or letters patent, an inventor or author has, by the common law, an exclusive property in his invention or composition until by publication it becomes the property of the general public. Authorities need not be cited in support of this proposition.

Counsel for the defendant claim that the case of *Tube Co. v. Tube Co.*, *supra*, is in *pari passu* with the case before the court; but as has been said, an examination of the case does not sustain this claim, for it seems the employee or the servant, and not the owner or employer, thought out or originated the idea or ideas which found expression in the patterns.

That a trade secret is a species of property will not be denied. The word property embraces money, debts, choses in action of every kind, as well as things that are visible or tangible. *Stahl v. Webster*, 11 Ill., 68; *Chadwick v. Covell*, 151 Mass., 190; *Watkins v. Landon*, 52 Minn., 389.

A secret process and an article made under it are separate and distinct things, and each is subject to ownership. The rule of law governing the matter is concisely stated in *Hartman v. Park & Sons Co.*, 145 Fed., 358. Number 1 of the syllabus says:

"The patent and copyright statutes, in conferring upon an inventor or author the exclusive right to make, use and sell articles embodying his invention or authorship, create in him a new right, and do not sustain or continue the previously existing right. The owner of a secret process not patented has no such exclusive right to make, use and vend the article to which it relates, but he has the right to keep his knowledge to himself and to the protection of same as the property right against one who, in violation of contract or through a breach of trust or confidence, undertakes to apply the secret process to his own use or to impart it to others."

An interesting case will be found in 114 Mich., 149-160. This is the case of *Owen W. Thum Co. v. Tloczynski*. It seems from the facts in this case that the process and machinery used by the proprietors of the business were regarded as secret and of great value. Much care was taken to exclude the public from the means of obtaining the knowledge of the processes, and when

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new machinery was to be constructed a part of it was got at one place and part at another, so that no person outside of the proprietors and their immediate employees should see a complete machine in operation. The employees in one department were not allowed in the other departments, and great care was taken to prevent them from obtaining knowledge of any branch of the business except that in which each was immediately engaged. At the time the defendant was employed in the business he knew of these facts, and it was held that the employment was upon an implied agreement that the defendant would not disclose or make improper use of the secrets of the business.

In the prayer of the petition it is asked that the defendant be enjoined "from attempting to procure a patent on said improvement and grinding machines, or communicating information in relation thereto to any other person or persons, natural or artificial; and to deliver to such receiver, for the purpose aforesaid, any written drawings or specifications in relation thereto."

The testimony discloses that the defendant made application for a patent on a worm grinding machine, through his attorney, in August, 1914, and that the application for such patent was filed in the patent office at Washington, D. C., as of December 26, 1914, over three months before the petition was filed. The defendant claims he had drawings partially prepared for this machine some months before he entered the employment of the plaintiff, and so informed Mr. Fitzpatrick, its superintendent. In this he is supported by the testimony of another witness who claims he saw a drawing or plan of the machine at the defendant's house, perhaps in August, 1913. The testimony as to this grinder is not only conflicting but confusing. In everything relating to it the parties are in sharp conflict. As the testimony was received the court was first impressed with the conviction that the main and principal features of the machine originated with the defendant. It is admitted that the plaintiff, through its superintendent, David Fitzpatrick, began to build a worm grinding machine some time before the defendant entered its employment. The base or structural parts of the machine had been cast, and it had been so far constructed that tentative efforts had been made to operate it, not perhaps in actual work, but for the

purpose of determining its practicability to the ends for which it was designed.

The defendant claims that on January 6, 1914, he exhibited to David Fitzpatrick and his son Clarence, at the plaintiff's shop in Cleveland, Ohio, the drawings or a drawing of the machine practically as it was finally constructed. He stated that he was positively certain as to the date, for he says that he wrote on the drawing itself, on the day that he exhibited it to these gentlemen, the following words: "M. E. Noyes, 1-6-14, shown to Mr. D. & C. Fitzpatrick." That is, that the drawing was shown to Messrs D. and C. Fitzpatrick on January 6, 1914. This endorsement is in the defendant's handwriting. On that day, however, January 6, 1914, the evidence positively and conclusively shows that neither David Fitzpatrick nor his son Clarence Fitzpatrick was in the city of Cleveland; that Clarence Fitzpatrick left the city January 3d or 4th, 1914, and was in the city of New York January 5, 1914, in attendance at an automobile show then being held in that city; and that he remained there until January 11, 1914. This appears from the diary kept by Clarence Fitzpatrick, which was introduced in evidence. The testimony also shows that David Fitzpatrick was also in New York City attending the same show from January 6 to January 11, 1914; and that he left the city of Cleveland perhaps on January 4th or 5th, 1914. This is established by proof of disinterested witnesses outside of David Fitzpatrick and his son Clarence, so clearly that there can possibly be no doubt about it.

This evidence of the defendant places him in an unenviable position. He may possibly have shown the drawing in question to David and Clarence Fitzpatrick at some time, but the fact that he testified that he made a memorandum on the drawing indicating that he had shown it to them on January 6, 1914, has the appearance at least of an attempt to manufacture testimony. When he made this memorandum he certainly knew what he was doing: and when the memorandum shows that the drawing was exhibited to David and Clarence Fitzpatrick January 6, 1914, and when from the facts in the case we know that that statement is not true, it is difficult to conceive what purpose the defendant had in view in making the memorandum, unless it was

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for the purpose of preparing in advance testimony that he undoubtedly knew that he might be called upon to give.

That the defendant made valuable suggestions as to the construction of this machine, is quite evident. The automatic indexing device and other improvements upon the original conception or idea of David Fitzpatrick were undoubtedly suggested by the defendant, though David Fitzpatrick insists that these ideas were taken from worm grinding machines then in use, photographs of which were called to the attention of the defendant during the construction of the machine by him. These photographs are in evidence, and bear a striking resemblance to some of the parts of the machine as finally constructed. Strictly speaking, there may be nothing really new or novel in this machine. The details of its parts do not fall within the purview of new contrivances applied to new ends, but rather to new combinations of old parts; that is, it consists in the combination, in a new form, of well known mechanical devices which grind worm threads in a more satisfactory manner than had been previously done, and for this reason it may be patentable. On this phase of the case the difficulty is not with the evidence, but rather with the law, so far as the prayer of the petition is concerned.

While it is true that state courts may have jurisdiction to pass judgment upon the title and validity of patents, this jurisdiction seems to be limited to cases where the defendant claims, incidental to his defense, the invalidity of a patent that may be involved in the controversy (*Pratt v. Light & Coke Co.*, 168 U. S., 255). The defendant filed his application for a patent on this machine three months before this action was commenced; and for aught that the court now knows, a patent may be granted on this application without any further action upon the defendant's part. The commissioner of patents is something more than a mere administrative official. He is the final judge, so far as the patent office is concerned, of all controverted questions arising in his office so far as granting or withholding patents is concerned (*Robinson on Patents*, Vol. 1, p. 84). To this extent the commissioner of patents performs judicial functions. The patentability of this device and the question of who originated the

idea of new combination of old parts to obtain a desired result is now before the patent commissioner. If David Fitzpatrick conceived and originated this idea, he may, by filing his application in the patent office, cause an interruption in the course of proceedings, and thus raise the question of interference and have the matter adjudicated in the patent office. Or if, by reason of any contract relation he had with the plaintiff, the plaintiff is entitled to the discovery if made by David Fitzpatrick, then the plaintiff may manufacture these machines and resist an application for an injunction by the defendant, provided the patent is allowed to him.

Section 711 of the United States Revised Statutes vests exclusive jurisdiction in the federal courts "of all cases arising under the patent right or copyright laws of the United States." This language seems broad and sweeping. Even if the defendant's conduct could be treated as an infringement on the rights of David Fitzpatrick, the federal court could not entertain it, for equity has no jurisdiction to enjoin the infringement of an invention before a patent has been issued, notwithstanding an application has been made and is pending in the patent office.

Rein v. Clayton, 37 Fed. Rep., 354: In this case it is said in the syllabus that:

"To constitute an action when arising under the patent-right laws of the United States, the plaintiff must set up some right, title or interest under the patent laws, or at least make it appear that some right or privilege under those laws will be defeated by one construction or sustained by the opposite construction of those laws."

Undoubtedly, as between David Fitzpatrick and the defendant, the question of priority of discovery is involved; and the claim of David Fitzpatrick or the plaintiff in this action is that a right, that is, the right of discovery, will be defeated if the defendant is permitted to obtain a patent for the grinder machine. But as has been said, this involves the question of priority of discovery, and we believe that that question is one arising under the patent laws of the United States.

In *Murjahn v. Hall*, 119 Fed., 186, the complainant alleged that he was the inventor of a new kind of water paint, which he

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was engaged in selling in large quantities; that he was induced to disclose his invention to the defendant on his promise that he would keep it secret and would purchase large quantities of the paint from the complainant; that the defendant, in violation of this agreement and without complainant's consent or knowledge, obtained a patent for the paint composition as his own invention, from which he derived large profits. It was held that "Such bill stated a cause of action against the defendant for an accounting and an injunction, and for an adjudication of the invalidity of the patent."

So that it will readily appear that if the plaintiff herein, or his agent, David Fitzpatrick, was the real inventor or discoverer of the worm grinding machine, he is not without remedy, even if the defendant should obtain a patent on the machine. In the case last cited there was no diversity of citizenship, so that the subject-matter of the litigation was the only thing of which the court had jurisdiction; and the fact that the court entertained jurisdiction is tantamount to saying or holding that a state court would not have such jurisdiction, and that the case was one arising under the patent laws of the United States.

Curtiss on Patents, Section 49, is cited by counsel for the plaintiff, and so far as the rule of law therein enunciated is concerned, the doctrine is unquestionably sound; and that is, if David Fitzpatrick, in his capacity of employer, or as the vice-principal of the plaintiff, conceived the result embraced in the worm grinder, or the general idea of the machine, he will be regarded as the inventor, even though he employed and used the manual dexterity and inventive skill of the defendant in the mechanical details and arrangements necessary to carry out the original conception; and this even though the defendant has made valuable additions which resulted in an improvement on the original conception or design or idea of David Fitzpatrick.

With this doctrine there can be no controversy. Many cases or authorities to the same effect are cited in the excellent brief of the able and learned counsel for plaintiff. Indeed, taking the testimony as a whole, and in view of the palpably obvious attempt of the defendant to strengthen his case by the statement, glaringly false if premeditated, that he submitted a drawing of

the machine to David Fitzpatrick and his son Clarence on January 6, 1914, we are morally convinced that the germ or root idea of the worm grinder originated with and was conceived by David Fitzpatrick before the defendant became shop foreman for the plaintiff. Blue prints of the device as formulated in the mind of David Fitzpatrick had been made and sent to a patent attorney for an opinion as to its patentability before the defendant was employed as shop foreman. A patent was not applied for because details had not been perfected, and the defendant was requested to assist in perfecting these details. To this end, such of the shop force as was necessary and all required materials were placed at the defendant's disposal, and during all of the time he was employed in constructing the machine on which he has applied for a patent he was being paid wages by the plaintiff.

It is true, and is a well-recognized legal principle, that when an employee in a certain line of work devises an important method or implement for doing the work, and uses the employer's property and time to put his invention into practical form, and he permits the employer to use the invention, he will thereby give him such a license to use the invention as will disentitle him to enjoin his employer as an infringer of the patent. This is what is known as shop rights. But if David Fitzpatrick really originated the idea, or discovered the method or combination of old devices or parts to a new application, the fact that he might use the plaintiff's work would be poor consolation.

In the device constructed before the defendant was given charge of its reconstruction, the indexing was manual, and by indexing is meant placing the emery wheel in the next succeeding thread to be ground. As perfected, it is automatic, an admittedly valuable improvement; but as has been said, plaintiff claims the idea of automatic indexing was suggested by other similar devices, photographs of which were called to the attention of the defendant by David Fitzpatrick. It is not denied that David Fitzpatrick worked on this device for over a year before it was turned over to the defendant to be reconstructed. The necessity for a new and improved worm grinder was evi-

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gently deemed imperative by the plaintiff for many years. Certain movements, for instance the carriage movement, in the old device were accomplished by what was called a pilot. In the new machine or device a gearing wheel takes the place of the pilot. This is, however, a matter of detail; the idea remains the same, that is, that there had to be a carriage to carry the worm to be ground up to the emery wheel. In the device as first built the reverse was made by means of a stop, pulleys and belts. In the new device as built by the defendant the reverse is different, and improved undoubtedly, but still it is only a means by which the carriage is reversed and brought back to start over again so as to grind the next thread of the worm.

The whole question resolves itself into this proposition: David Fitzpatrick had a clear idea of what he wanted, or what device he wanted to grind worms. This idea took form and shape under his direction as a structure or machine which, upon testing, demonstrated certain defects or showed certain defects; but these very defects suggested ideas for their removal or remedy. Practically all inventions are the result of repeated trials. The inventor knows what he desires to accomplish; the idea assumes tangible form in the shape of a device. It may prove defective on trial or test, but observation of the defect or defects frequently unerringly points out the road to success. But admitting that David Fitzpatrick originated and conceived the root idea embodied in this grinder, we can not see our way clear to enjoin the defendant "from attempting to procure a patent on" it, the application therefor having been filed in the patent office three months before commencement of this action. The patent office can not possibly be restrained from considering and passing upon the application. If the patent office should pass favorably upon this application, as it may at any time, it would be a vain thing to enjoin the defendant from attempting to do that which he has already done, that is, provided nothing further is necessary to be done or may be required of him. We do not believe the authorities cited by learned counsel for plaintiff sustain his contention in this respect.

If a man is sued in the state courts upon a promissory note, he may plead want of consideration. This is elementary. If the

consideration was the assignment of a patent or rights therein, and the patent was void or of no possible value, that fact may be shown by way of defense; because if the patent was void or of no possible value, then there was no consideration for the note. The validity of the patent for which the note was given is merely incidental to the defense, and to deny the defendant the right to plead and prove that fact would be a denial of justice. The state court having jurisdiction of the subject-matter, and there being no diversity of citizenship, the defense could not be denied without ousting the state court of its jurisdiction.

This was the question in *Darst v. Brockway*, 11 Ohio, 462.

In *Blakeney v. Goode*, 30 O. S., 350, the action was for damages for breach of contract, the defendant having agreed, for a sufficient consideration, to use his skill as a machinist to make a patent article as salable and profitable as possible. The validity of the patent was conceded, and it could not be said in any sense that the controversy or cause of action was one "arising under the patent right or copyright laws of the United States."

In *Wilson v. Sanford*, 10 Howard, 99, the court in the opinion said:

"The dispute in this case does not arise under any act of Congress; nor does the decision depend upon the construction of any law in relation to patents."

In the case now before the court, David Fitzpatrick claims he conceived the idea of a worm grinder, and that he reduced his idea to practice and embodied it in a distinct useful form, and it therefore falls within the scope of a patentable invention.

The defendant, Mayhew E. Noyes, claims the idea was conceived and originated by him, and by him reduced to practice and embodied in a distinct patentable form. We are called upon to say or determine where the truth lies as between these men. This involves not only the question of discovery of the idea, but the priority of discovery as well. And if we had a right to pass upon these questions, we apprehend we should be governed by the rules and precedents of the patent office, based upon acts of Congress or statutes of the United States.

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We think all the cases cited by counsel for plaintiff in support of the contention that this court may grant the relief prayed for in this respect are subject to similar criticism.

In view of the foregoing, the court holds that the plaintiff may have all the relief prayed for, except that of enjoining the defendant "from attempting to procure a patent on said improvement and grinding machine," that is, from procuring a patent on the worm grinder.

If it is desired that this shall be a final hearing, the defendant may file an answer and the injunction will be made perpetual; and an entry will be made to that effect, and the plaintiff and defendant given an exception.

**DISCHARGE IN THE MUNICIPAL COURT FOR AN OFFENSE
HIGHER THAN ITS JURISDICTION.**

Common Pleas Court of Hamilton County.

STATE OF OHIO V. WILLIAM H. STIVER.

Decided, June 9, 1915.

*Criminal Law—Discharge in Municipal Court Under a Felony Charge—
Not a Bar to Subsequent Prosecution.*

A person arrested upon a warrant charging him with embezzling \$77, a felony for which he was discharged in the municipal court, can not set up this discharge as a plea in bar to an indictment in the common pleas court charging him with embezzlement of the same \$77, for the reason that the municipal court did not have jurisdiction of the felony charge, its powers being limited to that of an examining magistrate.

Walter M. Locke, Assistant Prosecuting Attorney, for the state.

Thornton R. Snyder, contra.

MAY, J.

The defendant was indicted at the January term, 1915, of this court for embezzling \$77 belonging to the Lyric Piano Company. To this indictment the defendant has filed a plea in bar

setting up that he was arrested "on the 22d day of October in the year 1914, upon an affidavit and warrant duly filed in the municipal court of the city of Cincinnati, in Hamilton county, Ohio, which court had complete and final jurisdiction to hear and determine the fact of the guilt or innocence of the defendant herein, the said William H. Stiver, and to render judgment and to impose a penalty, and a charge placed against him, the said William H. Stiver."

The plea then sets out the affidavit which charges the defendant with having embezzled \$77. To that plea in bar are attached copies of the original affidavit, as well as the warrant, and there is also filed therewith a certified copy of all the proceedings had in the municipal court. The transcript of the municipal court shows that the defendant was brought into the court on October 23, 1914. Bond was given and the case continued to November 6, 1914. Between November 6, 1914, and January 22, 1915, there were four continuances, and on January 22, 1915, the transcript shows the following proceedings were had in the municipal court:

"Friday, January 22nd, 1915. Court met pursuant to adjournment Friday, January 22d, 1915, at 9 o'clock A. M., Hon. W. Meredith Yeatman, presiding.

"No. 10589. State of Ohio vs William H. Stevers. Charge.

"This day said cause coming on for hearing upon the affidavits and warrants filed herein, defendant being in court and arraigned, pleaded not guilty and court hearing the testimony, order said defendant to be dismissed for good cause shown."

To this plea in bar setting up a former acquittal the state has filed a demurrer "for the reason that said plea in bar does not state facts sufficient in law to constitute a defense to the indictment in said cause, nor does it state facts sufficient in law to bar further prosecution of said cause under said indictment." The demurrer was argued orally and upon brief, and after due consideration, I am of the opinion that the demurrer is well taken and should be sustained.

Counsel for the defendant rely upon a decision of Judge Hollister in 1902, when he was judge of the common pleas court of

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this county, in the case of *State of Ohio v. Skinner*, 13 Ohio Decisions, page 468.

There is no doubt whatsoever, but that if the Skinner case is good law it is authority for the proposition contended for by the defendant. The syllabus in that decision reads as follows:

"A plea in bar to an indictment for larceny of property of the value of \$45, alleging that previously the defendant had been dismissed in the police court, after testimony had been heard, on a charge of larceny preferred against him in an affidavit filed in that court, 'and that the larceny charge in the affidavit upon which he was tried is the same larceny and offense as is charged in the * * * indictment against him,' admitted by the state's demurrer to be true, presents a complete defense to the charge made in the indictment."

With all deference to the opinion of the learned judge, now United States District Judge for the Southern District of Ohio, I can not agree with the reasons given by him. Judge Hollister seems to be of the opinion that because the police court had jurisdiction of a misdemeanor, and that because in the indictment for larceny a misdemeanor is necessarily charged, that the dismissal of the defendant in the municipal court of the whole charge, the court having jurisdiction in larceny matters up to the sum of \$35, that the finding of the police court judge was to the effect that he was not guilty of even a misdemeanor, and therefore he had been placed in jeopardy.

All the Ohio cases cited by Judge Hollister are to the effect that where a person has been indicted and put upon trial, a jury being impaneled and sworn, and a verdict rendered finding the defendant guilty of a lesser crime than the one charged, or the jury being discharged before verdict, that the defendant has once been in jeopardy.

The leading case is that of *Mitchell v. State*, 42 Ohio St., page 383, and there is no doubt of that proposition, the reason being that the court before whom the defendant was put upon trial had jurisdiction of the offense, and as in the Mitchell case, the jury could have found the defendant guilty of a lesser offense, it was error to discharge the jury and re-indict the defendant. But, in the case at bar, the defendant never was in

jeopardy for the reason that the municipal court, before whom the defendant was brought in pursuance of the warrant issued upon the filing of the affidavit charging him with embezzling the sum of \$77, had no jurisdiction to try him for that offense, which under the laws of this state is a felony.

It is an elementary proposition that legal jeopardy does not arise when the court before which it is claimed the defendant had been in jeopardy, has no jurisdiction of the offense. 1 *Wharton on Criminal Law*, Section 396, at page 530, and cases cited.

The powers of the municipal court in criminal matters are the same as those of a justice of the peace. Under Section 13511, General Code, it is provided that when the accused is brought before the magistrate and there is no plea of guilty, the magistrate shall inquire into the complaint in the presence of the accused, and if it appear that an offense has been committed and there is probable cause to believe the accused guilty, he shall order him to enter into a recognizance for his appearance at the proper time and before the proper court; otherwise, he shall discharge the prisoner from custody. It is further provided by this section that if the offense charged is a misdemeanor and the accused, in a writing subscribed by him and filed before or during the examination, waive a jury and submit to be tried by the magistrate, he may render final judgment.

There is, therefore, no authority in the municipal court to render final judgment in a felony case and the discharge of the prisoner by the judge presiding in the municipal court acting as an examining magistrate, has not placed the defendant in jeopardy for the reason that the jurisdiction of the judge of the municipal court is limited to the ascertaining of the fact of whether or not there is probable cause to believe the accused guilty. In this case an examination of the plea in bar fails to disclose any waiver of a jury on the part of the defendant. Stiver, or any other act on his part by which he submitted himself to the jurisdiction of the court for trial on a misdemeanor. If there had been a waiver filed or if the record of the proceed-

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ings before the municipal court disclosed any fact from which it might be inferred that the defendant submitted himself to the jurisdiction of the court upon a charge for a misdemeanor the plea in bar might be good.

Counsel for the defendant, besides relying upon the decision of Judge Hollister, cited above, lay great stress upon the opinion of the Supreme Court of Massachusetts, in the case of *Commonwealth v. Bosworth*, 113 Mass., 200. An examination of this case shows that it is easily distinguishable from the case at bar.

The syllabus in the Massachusetts case reads as follows:

“When an inferior court has jurisdiction of an offense upon property if the value of the property does not exceed a specified sum, a plea of former acquittal of such offense in the inferior court is a good bar to an indictment for it in a superior court, although the value of the property is alleged in the indictment to be a sum exceeding the jurisdiction of the inferior court.”

Gray, Chief Justice, says in his opinion:

“By demurring to the plea, he (the attorney for the commonwealth) admitted the truth of the allegation therein that the offense now charged against the defendant was the same of which he had been already acquitted.”

But in that case it appears from the opinion that the municipal court had jurisdiction of the offense charged against the defendant Bosworth.

In the case at bar it clearly appears from the statutes that the Municipal Court of Cincinnati did not have jurisdiction of the charge of embezzling the sum of \$77; that the only jurisdiction the court had would have been in case of a misdemeanor, and then only in the event of the prisoner submitting himself to the jurisdiction of the court by a plea of guilty of the misdemeanor charge or by the filing of a new affidavit setting forth that charge and the waiving of a jury. If this were not the law, the result would be that a discharge of the person accused of a felony by the municipal court, or by any examining magistrate who had authority to try a misdemeanor included with-

in the larger offense charged, would prevent the indicting of the accused and placing him upon trial for the felony charged before a court of competent jurisdiction. For example, one arrested for murder in the first degree can under the law of this state, be found guilty of murder in the second degree, manslaughter, assault and battery, or assault. If the examining magistrate discharged him, the examining magistrate having jurisdiction to try cases of assault and assault and battery, the proper steps being taken, the defendant, upon being indicted by a grand jury could plead former acquittal. Likewise, if the defendant were arrested for robbery and were discharged, he could set up the same defense for the reason that assault and battery, and assault are offenses included within the charge of robbery. And so, with the graver crime of rape, where assault and battery, and assault are held to be included offenses.

I can not believe that the law as announced in 13 Ohio Decisions, 468, *State v. Skinner*, is a correct statement of the law; and inasmuch as there is no Ohio case decided either by the Supreme Court or by any court of appeals in this state announcing the same principle, I am of the opinion that the state's demurrer is well taken and that the same should be sustained.

The defendant will be granted further time to plead to the indictment charging him with embezzlement of \$77.

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Bank v. Provision Co.

**DEFENSES OF ACCOMMODATION MAKER UNDER THE
NEGOTIABLE INSTRUMENTS ACT.**

Common Pleas Court of Muskingum County.

**THE FRANKLIN BANK CO. OF NEWARK, OHIO, v. THE G. E. HOW-
ELL PROVISION CO. ET AL.**

Decided, June 4, 1915.

Promissory Notes—Defense of the Privileges of a Surety Closed to an Accommodation Maker—Failure of the Bank (Holder) to Sue After Written Notice so to do—Verbal Release by Bank Officer Ultra Vires and of no Avail—Primary Liability of One Who Signs on the Face of a Note.

1. One who signs a note as an apparent maker and principal debtor, can not subsequently assert the contrary and thus affect his liability on the instrument, and a defense based on the privileges of suretyship, as they existed prior to the negotiable instruments act, is open to demurrer.
2. A release in writing for a valuable consideration in and of itself constitutes a valid defense under the negotiable instruments act; but where the evidence supporting the allegation as to a release consists only of a verbal statement to the accommodation maker, by the cashier of the bank holding the note, that he was released—a statement a cashier would have no authority by virtue of his office to make, and which would be *ultra vires* in the mouth of any bank officer where no consideration had passed—no estoppel *in pais* is created, notwithstanding the accommodation maker acted upon it to his prejudice.

Booth, Keating, Peters & Pomerene, Fitzgibbon & Montgomery and E. R. Meyer, for plaintiff.

E. F. O'Neal, B. F. McDonald and Roderick Jones, contra.

FRAZIER, J.

A jury having been waived, this cause was submitted to the court upon the pleadings, the evidence, and the briefs of counsel. The plaintiff sues on a promissory note, a copy of which is as follows:

"\$25,000.00.

NEWARK, OHIO, May 1, 1905.

"One day after date, for value received, we jointly and severally promise to pay to the order of the Franklin Bank Co., at Newark, Ohio, at its office, \$25,000, with interest from maturity, at 8% per year upon both principal and accrued interest, payable annually, and we authorize any attorney at law in the United States to appear before any court of record, after the above money becomes due, and waive the issuance and service of process, and to confess judgment against us or either of us, in favor of the holder of this note, for the amount appearing due, the costs of the suit, and an attorney fee; thereupon to release all errors in any action brought or judgment rendered upon the note.

"(Signed) THE G. E. HOWELL PROV. CO.

JOHN M. FLEMING, *Treas.*"

G. E. HOWELL, *Pres.*

"G. E. HOWELL,

"JOHN M. FLEMING."

John M. Fleming, one of the makers of said note, has filed an answer to the petition, containing six separate defenses, but two only of said defenses are now insisted upon, viz., the first and the third.

In the first defense, it is averred that the defendant, Fleming, signed the note set up in the petition, as surety for the G. E. Howell Provision Co., the maker of the note, and that he received no part of the consideration; that the plaintiff, at the time of the execution and delivery of said note, had full knowledge and notice of the fact that defendant Fleming was surety only for the said the G. E. Howell Provision Co. and that he accepted the said note with the full understanding and agreement with the defendant Fleming that the defendant Fleming was surety only on said note; that on the second day of August, 1909, after said note became due and payable, defendant Fleming required plaintiff, by notice in writing served upon it, to commence an action forthwith against said principal debtor; that plaintiff did not commence nor prosecute said action with due diligence in that it did not, at the time nor at any time since, commence nor prosecute said action, until the filing of the petition herein on the nineteenth day of January, 1914.

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It is averred in the third defense that on or about the second day of August, 1909, and for a long time thereafter, the G. E. Howell Provision Co. was a solvent institution and was enjoying credit, and able to obtain credit to a sufficient extent to cover all its needs, and did so obtain credit until the second day of August, 1909; that on said last date, the defendant Fleming was desirous of being relieved from his obligation on said note, and intended to take all such steps as were necessary to have said obligation extinguished or satisfied, all of which facts the plaintiff well knew; that at said last mentioned date, this defendant, Fleming, had full knowledge of the ability of the Howell Provision Co. to meet its obligations and to obtain credit to meet all its obligations, and this plaintiff, at said time, had knowledge of the ability of said Howell Provision Co. to meet its obligations and obtain credit, and at said time this defendant fully informed the plaintiff of his desire to be released from the obligation of the note and his intention to take such steps as were necessary to cover and satisfy his obligation on the same; that at said time or soon thereafter, the said plaintiff, for a valuable consideration, in writing released and discharged this defendant from all further liability upon said note in the petition described, and thereupon said plaintiff represented to this defendant and caused him to believe that the said plaintiff had fully, effectually, and legally released him from all obligations upon said note; that because of such representation by the plaintiff and defendant's belief in the same and reliance thereon, plaintiff prevented defendant from taking such steps at that time as he would otherwise have taken to have released himself of all obligation under said note and from obtaining complete extinguishment and satisfaction of his obligation on the same; that ever since said date plaintiff has represented to this defendant and caused him to believe that he had no obligation arising upon said note, and because of such representations this defendant did believe that he had no obligation on the same, and because of such representations and such belief defendant was thereby prevented from taking the steps he otherwise would have taken to enforce the collection of said note against the defendant company at a time when collection could have been

made without loss to this defendant. Because of the representations, this defendant did forbear to take any steps to enforce collection of said note against the G. E. Howell Provision Co. and did forbear doing anything to protect himself from loss on account of said note. That the said Provision Company is now insolvent and its affairs are being administered by a receiver and its estate will pay to the creditors a dividend of only about fifty per cent. That on said second day of August, 1909, and for at least one year thereafter, said G. E. Howell was the owner in fee simple of large amounts of real estate situated in Licking county and elsewhere, free and clear of all encumbrance, and that by reason of said representations made by said plaintiff bank, said Fleming was caused to believe and did believe that said plaintiff had fully released him from all obligation on said note, and that because of such representations and defendant's belief in the same and reliance upon the same, the plaintiff prevented the defendant from taking such steps as he otherwise would have taken to obtain contribution from said George E. Howell for any money which this defendant might have paid or be compelled to pay by reason of his liability on said note. That ever since the said date of August 2d, 1909, down to and including the date of the filing of this suit, the defendant, because of said representations, did believe that he had no obligation on said note, and because of such belief the defendant, Fleming, did forbear to take any steps to enforce contribution from the said G. E. Howell for any money which the defendant may have paid or be compelled to pay by reason of his liability on said note. That at various times since the second day of August, 1909, and prior to the filing of this suit, the said George E. Howell, by various conveyances and mortgages, has sold or encumbered for its full value, all of the real estate belonging to said Howell in Licking county or elsewhere. That the said Howell is now insolvent, that he has no property of any description, known to this defendant, from which by execution or otherwise a sufficient amount could be made to contribute to this defendant his share of any money that this defendant may pay or be compelled to pay by reason of his liability on said note. And said defendant, Fleming, says that by reason of the prem-

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ises, especially by reason of the representations in his defense alleged to have been made by the plaintiff to this defendant, and by reason of the valuable rights which this defendant has lost by reason of said representations and his reliance thereon, the plaintiff was and is estopped from enforcing any liability of this defendant to it by reason of said note.

To this answer the plaintiff has filed a reply denying all the allegations therein contained.

The plaintiff, at the trial, objected to the reception of any testimony in support of said defenses, on the ground that the facts therein do not constitute a defense. The first question, therefore, to be decided is, whether the facts alleged in either of said defenses constitute a valid defense to the note.

It is plaintiff's claim that, under the principles stated in the case of *Richards v. Bank*, 81 O. S., 348, *et seq.*, both of said defenses are amenable to a demurrer. On the other hand, the defendant claims that the *Richards* case should not govern here for the reasons, (1) that the above named defenses present a state of facts not involved in the decision of that case, and hence that the principles announced therein do not govern here; (2) that the court, in the *Richards* case, through misapprehension and misconception of the scope of the negotiable instruments act, has broadly construed the provisions of said act relating to the discharge of instruments and the release of parties (which provisions defendant claims are designed to affect rights of holders in due course) to apply indiscriminately to all holders of negotiable instruments; in other words, defendant's counsel claim that the provisions of the negotiable instruments act relating to the discharge of instruments and the release of parties are without force and effect, until there has been a negotiation of the instrument; and that the provisions regarding discharge and release relate to the status of the parties and the condition of things upon and after the act of negotiation of the instrument and not to the status or the liability of the parties before negotiation; (3) that as between the original parties to a negotiable instrument, and as between all holders (otherwise than as holders in due course) and the other parties to the instrument, every defense available prior to the time the negotiable instru-

ments act went into effect is still available, whether such defense is one recognized by the law merchant or given by statute; that the negotiable instruments act by its express provision (Section 8163, General Code) recognizes and preserves such defenses; (4) that the doctrine of the *Richard's* case has been repudiated by eminent courts of last resort in other states.

The situation requires a somewhat extended analysis of the *Richards* case. In that case, the plaintiff bank brought suit on a note for \$5,000, executed to its order by the Ohio Dredging Co. and C. E. Richards. The defendant Richards answered that he was surety only on the note, the Ohio Dredging Co. being principal, all of which was known to the plaintiff, and that plaintiff had, without the knowledge or consent of the answering defendant Richards, for a valuable consideration, extended the time of payment of the note. From this statement it will be seen at a glance that the note had not been negotiated, that the suit was between the original parties to the note, and that Richards occupied the position of an accommodation maker and claimed the rights and privileges of a surety. With reference to his note, Richards occupied the same relative position that defendant Fleming occupies to his note. The question presented for solution in the *Richards* case was whether an accommodation maker could claim the privileges of suretyship as they existed prior to the negotiable instruments act, and could avail himself of the defense that a valid contract had been entered into by the creditor and the principal debtor for extension of time of payment: a defense of equitable origin (*Ide v. Churchill*, 14 O. S., 385) recognized in all courts prior to the adoption of the negotiable instruments act.

The questions presented for solution here are whether Fleming, as an accommodation maker, can claim the privileges of suretyship as they existed prior to the negotiable instruments act and thereby can avail himself of the statutory defense that plaintiff failed to sue upon the note after due notice to sue, as alleged in the first defense, and likewise whether he can avail himself of the defense of estoppel, as alleged in his third defense.

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In the last analysis, the defense in the Richards case and the defenses here, are grounded upon the claim that, notwithstanding their apparent status as makers, Richards in his case and Flem- here are in fact mere sureties, and hence that they have the right to claim all the privileges attending that relationship.

The syllabus in the Richards case is as follows:

"1. One who signs a promissory note on the face thereof and who in that way becomes surety for the principal maker is by force of Section 3178, Revised Statutes, primarily liable for the payment of said note.

"2. Section 3175j, Rev. Stat., relating to the discharge of negotiable instruments, provides in what manner and for what causes such instruments may be discharged and by force of the rule *expressio unius est exclusio alterius*, sureties upon such notes who are primarily liable thereon can not be otherwise relieved from responsibility for their payment.

"3. The rule of common law that any agreement between the holder of a promissory note and the principal, which varies essentially the terms of the contract by which a surety is bound, without the consent of such surety, will work his release from liability is no longer in force as to one who has signed on the face of the instrument, such rule having been in effect abrogated by Section 3175j, Revised Statutes."

Judge Spear, who rendered the opinion in this case, says in part:

"That act (the negotiable instruments act) establishes the status of parties to negotiable instruments. As to accommodation parties, the provision (Section 3172a) is:

"*(Liability of Accommodation Party.)* An accommodation party is one who signs the instrument as maker, drawer, acceptor, or endorser, without receiving value therefor, and for the purpose of lending his name to some other person. Such a person is liable on the instrument to a holder for value, notwithstanding such holder, at the time of taking the instrument, knew him to be only an accommodation party."

"As to those primarily liable, it provides that:

"The person primarily liable upon an instrument is the person who, by the terms of the instrument, is absolutely required to pay the same. All other parties are secondarily liable."

Judge Spear further says:

"By the negotiable instruments act, the discharge of negotiable instruments, as to persons primarily liable is provided in Section 3175j, and is as follows:

"Discharge of Negotiable Instruments. Section 3175j (*Instrument; how discharged*). A negotiable instrument is discharged:

"1. By a payment in due course by or on behalf of the principal debtor;

"2. By payment in due course by the party accommodated, where the instrument is made or accepted for accommodation;

"3. By the intentional cancellation thereof by the holder;

"4. By any other act which will discharge a simple contract for the payment of money;

"5. When the principal debtor becomes the holder of the instrument, at or after maturity, in his own right."

The negotiable instruments act makes provision for discharge with respect to persons secondarily liable:

"Section 3175k. (*When persons secondarily liable are discharged*.) A person secondarily liable on the instrument is discharged:

"1. By any act which discharges the instrument;

"2. By the intentional cancellation of his signature by the holder;

"3. By the discharge of a prior party;

"4. By a valid tender of payment made by a prior party;

"5. By a release of the principal debtor, unless the holder's right of recourse against the party secondarily liable is expressly reserved;

"6. By any agreement binding upon the holder, to extend the time of payment or to postpone the holder's right to enforce the instrument, unless made with the assent of the person secondarily liable, or unless the right of recourse against such party is expressly reserved."

Judge Spear further says:

"The entire field of discharge appears to be here covered, and unless some controlling reason can be adduced showing that this statute does not apply, its application to and control of the case at bar would seem to follow. It is, however, insisted by counsel for plaintiff in error that, since there is in the latter act no ex-

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press repeal of earlier legislation bearing on the rights and liabilities of the parties on negotiable instruments, and since repeals by implication are not favored, we must conclude that the former legislation is still in force, and inasmuch as there is apparent conflict between the negotiable instruments act as construed by the courts below and the earlier legislation, it must be presumed that the construction thus given the act is not the correct construction and that the purpose ascribed by those courts to the General Assembly in passing the act was not its real purpose.

“The sections of the Revised Statutes to which special attention is called by counsel are Sections 5419, 5832, 5836, Revised Statutes. However, reference is likewise made to other sections of the same chapter. * * *

“We fail to perceive any necessary conflict between these sections and the negotiable instruments act, in the particulars here involved. * * * The present section (3175j, Revised Statutes) as we have already found, provides only for the discharge of a party by a discharge of the instrument itself. Section 5833, Revised Statutes, provides that ‘A person bound as surety in a written instrument for the payment of money may, if a cause of action accrue thereon, by written demand require the creditor to commence an action forthwith against the principal debtor and proceed diligently to collection, and failure to comply by the creditor shall work a forfeiture of his right to recover of the surety.’

“Here is a provision for discharge as to the instrument itself, and the question is, to whom, taken in connection with all the provisions of the negotiable instruments act bearing on the question of discharge, does it apply? Whether or not it might apply to those who are by Section 3178a, Revised Statutes, made secondarily liable, we need not stop to inquire, for we have not that situation. But it appears irreconcilable with Section 3175j, if attempted to be applied to parties whose names appear on the face of the instrument. We are of opinion that at all events, it should not be held applicable to those who by the terms of the negotiable instruments act are primarily liable, and the same conclusion applies to Section 3854, Revised Statutes. However, if these sections, or any of them, are so inconsistent with the negotiable instruments act as that they can not stand with it, then we are satisfied that the older enactments must give way. * * *

“The evident intent of the General Assembly by the negotiable instruments act was to revise the general subject of the law

of negotiable instruments, and where specific provisions are made in the act in respect to a special subject-matter, such provisions must prevail. So where it is declared, as it is here declared, that a party to such an instrument who is absolutely required to pay the same is primarily liable and can be discharged from liability in certain specified ways and for certain specified causes, the reasonable conclusion is that the purpose was to enact that such party can not be discharged in any other way or for any other purpose."

"The act further provides that an accommodation party may be a maker without himself receiving value, that he engages that he will pay the instrument according to its tenor and may be held liable to the holder, though that party knew him to be only an accommodation maker, thus classifying him as one primarily liable, and in a subsequent section the act further purports to embody all the law as to release of parties "primarily liable" on negotiable instruments, by providing for the discharge of the instrument itself."

It will be seen from the foregoing that the court in the Richards case determined that, under the negotiable instruments act, the liability of an accommodation maker is primary and absolute; that the act having provided that one primarily liable can be discharged from liability only in certain specified ways and for certain specified causes, he can not be discharged from liability in any other way or for any other cause. The court, however, is careful to limit the case solely to discharge from liability incurred by a valid original obligation, and expressly says that the holding of the court does not imply that the ordinary defenses of fraud, duress, illegality of consideration, or other defenses that go to the original liability, are eliminated; and this view seems to harmonize the various provisions of the act.

The defense in the Richards case and the defenses here do not pertain to the original liability, but grow out of the subsequent conduct and acts of the parties, so that these defenses clearly fall within the category of "Discharge."

As to the first defense:

The negotiable instruments act having fixed the status of the accommodation maker, as between himself and the holder, he

can not assume any other position or status. As to the holder, he can not say that, "My position on the note is only apparent; my real position is otherwise." As to the liability of parties to a negotiable instrument, the negotiable instruments act recognizes only two classes; those primarily liable and those secondarily liable. The word "surety" is nowhere found in the act. To permit the accommodation maker to assume the position of a surety only is to place him in the category of those liable secondarily, which is directly antagonistic to the express provisions of the statute. It is true that the statutes in existence prior to the adoption of the negotiable instruments act permitted the real relation to be shown and gave to the surety the right to serve the creditor with notice to sue and upon his failure so to do the security was discharged from all obligation on the note. Those statutes have not been repealed. Are they still in force so far as accommodation makers of negotiable instruments are concerned?

The views expressed by Judge Spear above upon this point while perhaps *obiter*, yet they are very persuasive and agree with my own opinion in the matter. Under the negotiable instruments act, Fleming's apparent engagement as the maker and the principal debtor is his real and actual engagement. He signed the note as maker. By the terms of the instrument, he is absolutely required to pay it. The statute in such case makes him an actual principal and renders him primarily liable, though in fact he received, with the knowledge of the bank, no part of the consideration and signed the note only for the purpose of lending his name to the Howell Provision Co. Having signed the note as an apparent maker and as an apparent principal debtor, he is not now permitted to assert the contrary so as to affect his liability on the instrument, and, as said by Judge Spear, "This position being antagonistic to the right conferred by Section 5833, Revised Statutes (12192, General Code), that section must give way." If I am right in these conclusions, then the first defense is amenable to a demurrer, and I so find.

Coming now to the third defense:

I feel like saying, as the Italians say, "*Pertroppo dibatter la verita si perde.*"

The contest in this case has waged earnestly around the issues made by this defense. One allegation requires preliminary consideration, to-wit, "that plaintiff for a valuable consideration, in writing released and discharged the defendant from all liability upon the note described in the petition * * * ." In my judgment, this allegation saves this third defense, and because of its presence in said defense, demurrer will not lie. No evidence, however, was offered of any release in writing or of any consideration for a release. Under the negotiable instruments act, this allegation of release in writing for a valuable consideration, in and of itself, would constitute a valid defense to the note.

Section 8227, General Code, provides:

"The holder may expressly renounce his rights against any party to the instrument before, at, or after its maturity * * * and renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon."

As to the other allegations of this defense, what has already been said in passing on the first defense as to the provisions of the negotiable instruments act is pertinent here. Leaving out of view the allegation of a release in writing, the whole theory of this third defense is based upon the assumption that the defendant Fleming was a surety only and secondarily liable. a position that, under the negotiable instruments act, as we have seen, he is not permitted to assume. Under this act, as accommodation maker his liability is primary and absolute. The defense of estoppel can not avail him, unless he can assume the position of surety. No suretyship, no estoppel. Cut away this element and the whole defense falls to the ground. The material allegations of the defense are that Fleming applied to the plaintiff's cashier to know why suit had not been brought against the defendant, the Howell Provision Co., on the note, in accordance with his previous written request therefor; that the cashier then said to him that he was released from all obligation on the note; that he was thereby, by reason of such representation, lulled into security and lost rights against the defendant, the provision company, and against his co-surety, Howell.

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It is not contended by counsel for defendant that Robbins, the cashier, actually released Fleming, or that Fleming was ever released by any formal act of the bank, or that the bank gave Robbins any express authority to release Fleming. Section 8227, General Code, provides that a renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon. This section of the negotiable instruments act has been considered in two cases: *Baldwin v. Daly*, 83 Pac., 724; *Pitt v. Little*, 108 Pac., 942. In those cases, it is said:

“An absolute and unconditional renunciation of his rights against the principal debtor made at or after the maturity of the instrument discharges the instrument, but a renunciation does not affect the rights of a holder in due course without notice. A renunciation must be in writing, unless the instrument is delivered up to the person primarily liable thereon. This plainly provides that renunciation of a debt must be in writing where the debt is evidenced by a negotiable instrument and if ‘renunciation’ is used therein in the sense of release, there can be no question that the appellant must show a written renunciation in order to prove the allegations of his answer. Counsel for the appellant argue that the word is used in a sense different from that of release and that while a renunciation must be in writing a release may be proved by parol, but we can not think that the statute permits of this distinction. The words, ‘The holder may expressly renounce his rights against any party to the instrument,’ must refer to the release and discharge of a party to the instrument from his obligation to pay it, else they can have no legitimate meaning.”

Defendant's counsel, however, assert that Robbins, the cashier, said to Fleming, “You are released,” and that such representation lays the foundation for an estoppel *in pais* against the bank to assert the contrary, when such representation has been acted upon by Fleming to his prejudice. Whether such representation will lay the foundation for an estoppel against the plaintiff bank will depend upon whether the cashier, Robbins, was expressly or impliedly authorized to make such representation. It is not claimed, and the evidence does not show, that Robbins had express authority to make such representation. It is claimed, however, by defendant's counsel, that the right to

make such representation by the cashier, falls within the ordinary and usual powers bestowed upon such officers, according to the customs and usages of the business in which such agents are employed. It is clear that the bank is not bound by the representation, unless such act falls within the apparent or ostensible authority of the agent. A bank cashier has no authority to bind the bank by declarations or admissions outside of the general line of his duty.

In the case of *Savings Bank v. Hughes*, 62 Mo. App. Rep., the second paragraph of the syllabus is:

"A cashier, without special authority, has no power to discharge a surety on a note without payment, and an instruction implying such power is condemned."

In this case, page 581, the ordinary and usual powers of cashiers are set forth:

"The cashier of a bank is held out to the public as having authority to act according to the general usage, practice, and course of business of such institutions. He is usually entrusted with all the funds of the bank, in cash, notes, bills, and other choses in action, to be used from time to time for the ordinary and extraordinary exigencies of the bank; he receives directly and through subordinate officers all moneys and notes; he delivers up all discounted notes and other securities when payments have been made; he draws checks from time to time for moneys whenever the bank has deposits. In short, he is considered the executive officer of the bank, through whom the whole monied operations of the bank in paying or receiving debts or disposing or transferring securities are conducted."

In *Bowles on the Modern Law of Banking*, page 362, it is said:

"In this regard, the law is as imperative as ever and consequently the cashier can not, without receiving an equivalent, release the maker, endorser, or guarantor of any obligation or release or give up any kind of property whereby the bank's interests would be sacrificed."

In *Bank v. Jones*, 8 Pt., 12:

"The officers of the bank have no authority as agents of the

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bank to bind it by assurances which would release the parties to a note from their obligations.”

In *Bank v. Wetzel*, 58 W. Va., 1, 70 L. R. A., 308, it is said:

“A cashier has no implied power merely by virtue of his office to receive money for interest in advance on a note owned by the bank and agree to extend the time of payment and thus discharge the endorser from liability.”

In *Clark & Marshall on Corporations*, Section 2158, it is said:

“The cashier of a bank, unless specially empowered to do so, has no authority to release otherwise than in the due course of business on a payment.”

In *Davis County Savings Assn. v. Saylor et al*, 63 Mo., 27, the first paragraph of the syllabus is:

“The general duties of the cashier of a bank are to collect notes, keep the funds arising from them, and deliver up notes and other securities when paid, and in the absence of special authority, he has no power to discharge the surety on a note, and his representations to the surety that he is no longer looked to will not bind the bank, nor will the bank *be estopped* from asserting its claim by reason of such assurance.”

Two cases cited by counsel for defendant clearly point out the limitations on the power of cashiers in regard to declarations made by them. In the case of *Bank v. Haskell*, 51 N. H., 116, 12 Am. Rep., 67, the cashier told the surety, who had applied to him for information about a note, that the note had been paid or secured, and that he (the surety) need give himself no further trouble about it. The court say:

“A cashier has no authority to bind the bank by a discharge of its debtors without payment or to release a surety by an agreement that he should not be called upon to pay a note that he was liable on in ordinary cases, but if, knowing one to be a surety upon a note, he informs him that such note is *paid*, intending him to believe it, and the surety, relying upon that statement, changes his position towards his principal by endorsing a new note or by giving up securities, the bank will be estopped from denying that the note is paid.”

In the case of *Manufacturers' Bank v. Schofield*, 38 Vt., 590, the surety applied to the cashier of the bank and inquired whether the note *had been paid*. To this inquiry the cashier responded that another party to the note (Flood) had told him that the note was for him (Flood) to pay and had directed him (the cashier) to charge it to Flood in his account with the bank, that he had done so, and that they need not give themselves any further uneasiness or trouble about the note, as it was all right. The court say:

"This is not an agreement between the cashier and the Schofields that they were to be discharged from their liability without payment and the bank to look to Flood for pay. Such an agreement the cashier could not have made that would have been binding upon the bank, and the Schofields would have been bound to know it. The information he gave was false. The defendant relied and acted upon it to his prejudice and now insists that the bank is estopped from enforcing the note."

The court held that the bank was bound by the representations of the cashier and was thereby estopped from asserting any claim against the surety.

It will be observed that in both these cases the inquiry was as to whether the respective notes *had been paid*, and in both the Haskell and Schofield cases the declaration of the cashiers was within their authority, because it related to the matter of payment of notes involved, a matter under their peculiar control, and, of course, within the knowledge of the cashiers. But in the case at bar, the declaration of the cashier was not that the note had been paid, but, "You are released," and in further conversation, it is claimed that the cashier said, "If I had known the condition of the Howell Provision Co., I would not have released you." It is apparent from the authorities already considered, that the cashier would have no power to release Fleming, and that Fleming would be bound to know that fact. The statement of a cashier that one is *released* from the obligation of a note is a very different thing from the statement that the note *has been paid*. While the usual powers bestowed on cashiers are broad enough to authorize the latter statement, be-

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cause the matter of payment is peculiarly within their knowledge, not so with reference to the statement about a release.

Under the authorities it would seem to be perfectly clear that the representation by the cashier to Fleming, that he had been released, was wholly outside of the sphere of his authority as cashier, and that Fleming was to know it and therefore he had no right to rely on it. The fair implication from the statements claimed to have been made by the cashier to Fleming is that the cashier had released Fleming, or at any rate, that the cashier's statements amounted to a representation about some act of his own as cashier, regarding the matter of release. Under the authorities, he had no power to make such statement or declaration about the matter. Defendant's counsel claim, however, that the statement of the cashier does not necessarily refer to an individual act of his own, but may have reference to an act of someone else higher up in authority than the cashier, and that Fleming may have so understood it; that by virtue of his position as cashier he would have knowledge of such act and that it would fall within his apparent power as cashier to impart information about it; that his representation, if relating to the supposed act of another, as the president or board of directors, would be as effective as if relating to a supposed act of his own. This position is no more tenable under the authorities than the other, for the reason that neither the president nor the board of directors itself has power to discharge a surety without a consideration for the discharge.

In the case of *Hodges Exors. v. Bank of Richmond*, 22 Gratt., pp. 49-52, it is held that:

"The directors of a bank can not release without a consideration a debt due to the bank. *A fortiori* they can not empower a cashier so to do and a *multo fortiori* the president can not do so by virtue of his office. Neither the president nor the cashier, by virtue of his office, can give up an obligation or a liability to the bank or bind the bank by such admission."

In *Bank of the United States v. Dunn*, 6 Pt., 51, it is held:

"Agreements by a president and a cashier that an endorser shall not be liable to the bank is invalid. They can not make

such agreement nor have they power to bind the bank except in the discharge of their ordinary duties."

So that, assuming that Robbins, the cashier, made the statements about the release, if Fleming understood thereby that the statements had reference to his own individual act as cashier, they would not lay foundation for an estoppel because (1) an oral release would not be effectual, (2) the cashier had no authority, express or implied, to make such statement. If Fleming understood that the statements of the cashier related to some action of the president or board of directors, they can not avail him, for the reasons already given and for the further reason that the act of the board of directors in making a release without a consideration would be *ultra vires* and equally futile as the act of the cashier in that regard. The statement of the cashier, even if it related to such supposed act on the part of the president or the board, would not have a particle more effect than if it related to his own supposed act.

The principles laid down in the Richards case and the construction therein given to the negotiable instruments act have received the sanction of other eminent courts of last resort. See cases of *Vanderford, Ex., v. Bank*, 105 Md., 164; *Rouse v. Wotten*, 140 N. C., 557; *Wolstenholme v. Smith*, 97 Pac., 329 (Utah); *Bradley Engineering Co. v. Heyburn*, 106 Pac., 150; *Cellers v. Meacham*, 49 Ore., 49; *Bank v. Toplitz*, 81 App. Div., 593 (affirmed 74 N. E., 1); *Frittz v. Kirkdoffer*, 124 S. W., 882; *Cowen v. Ramsey*, 140 Pac., 50.

Opposed to these authorities are the cases of *Lumber Co. v. Snouffer*, 117 N. W., 50 (Ia.); *Long v. Shafer*, 171 S. W., 690 (Mo. Ct. App.).

In these two cases, the doctrine is maintained that the proper construction of the negotiable instruments act, so far as it relates to the discharge of instruments and to the release of parties, is to fix the rights of holders in due course and that it does not apply to any other class of holders. In the case of *Long v. Shafer, supra*, which followed the *Snouffer* case, there is a dissenting opinion by Judge Sturges, in which he states that the opinion of the majority of the court is opposed to the current of authority.

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Other decisions are cited by defendant's counsel which bear upon the question.

In the negotiable instruments act, we find the terms "holder," "holder for value," "holder in due course." To limit the provision relating to a discharge to holders in due course only, it seems to me, is to do violence to language. The section says that a negotiable instrument (not a negotiated instrument) is discharged, etc. * * * by intentional cancellation by the holder (not holder in due course).

As to the contention made by the defendant that the attention of the Supreme Court in the Richards case was not directed to this phase of the subject and that, if it had been, the decision might have been otherwise, it is only fair to say that the eminent judges of that court could hardly have overlooked so vital a matter. The briefs of counsel in that case and Judge Spear's opinion in the case show that the case took a very wide range. To reach a conclusion, existing statutes relating to sureties and practically the whole of the negotiable instruments act had to be considered. Since the decision of the Richards case, other eminent courts of last resort have refused to follow the doctrine of the Iowa case and have approved the doctrine of the Richards case and adopted it as the law of their jurisdictions.

This is a case of great hardship and grows out of the transition from the old to the new law. The negotiable instruments act was passed in 1902. The note sued upon here was made in 1905. The Richards case was not decided until 1908. There is this to be said, however: that the negotiable instruments act does not affect rights of makers *inter partes*. Fleming, as surety, had certain rights that he could have enforced as against his principal. Section 12206, General Code, gives him the remedy to compel the principal to pay or secure the debt.

The finding will be in favor of the plaintiff for the full amount claimed, less the credits, with interest to the first day of this term. I find the amount to be \$10,242.24. Exception noted. Motion for a new trial may be filed, which motion will be overruled, and exception noted.

**VALIDITY OF ISSUE OF BONDS NOT OFFERED TO
BOARD OF EDUCATION.**

Common Pleas Court of Huron County.

CLEVELAND, S. & C. RAILWAY, A TAX-PAYER, v.
CITY OF NORWALK ET AL.*

Decided, February 18, 1915.

Municipal Corporations—Failure to Offer Municipal Electric Light Bonds for School Board in the Absence of a Board of Commissioners of the Sinking Fund—Does Not Render Such Bonds Invalid, When—Resolution Declaring an Issue of Electric Light Bonds Necessary, and Fixing Date for Submitting the Question to the Electors Need Not be Published—Sections 3943, 3949 and 7614.

1. Bonds issued in conformity to Section 3949, General Code, for the erection of a municipal light plant, are not, in the event of failure of the common pleas court to appoint a "board of commissioners of the sinking fund" of such district as provided by Section 7614, required to be offered to the board of education, but it is sufficient if such bonds are offered to the municipal sinking fund trustees, who are charged in such event with the dual management of both city and school sinking funds; and in the absence from a petition to enjoin the execution and delivery of such bonds of an allegation that they were not offered to the municipal sinking fund trustees in their dual capacity, it will be presumed that the officials properly discharged their duty, and a demurrer thereto will be sustained.
2. A resolution declaring it necessary to issue and sell bonds for the erection of a municipal electric light plant and stating the amount of the proposed issue and date for submission of the question to the electors of the corporation for their approval, is not within the meaning of Section 3943 as amended, requiring the publication of ordinances of a general nature or those providing for public improvements.

L. W. Wickham and Tolles, Hogsett, Ginn & Morley, for plaintiff.

R. D. Wickham and G. Ray Craig, contra.

*Affirmed, *Cleveland, S. & C. Ry. v. Norwalk*, 22 C.C.(N.S.), 580.

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YOUNG, J.

Demurrer to petition for injunction.

This case comes before me upon a demurrer to the petition, there having been issued, upon the filing of the petition, a temporary restraining order.

The case was originally set down for hearing on whether a temporary injunction should be issued, but by consent was heard upon demurrer.

The plaintiff in its petition relies substantially upon two claims, the first of them being that a preliminary resolution passed by counsel of the city of Norwalk upon the institution of proceedings that resulted in the issuing of these bonds which is sought to be enjoined was not published.

The second ground is that introduced by the amendment to the petition, that prior to the offering of the sale of said bonds to competitive bidding no tender was made of them, or any part thereof, to the commissioners of the sinking fund of the school board of the city of Norwalk, or the Norwalk school board.

Taking up this last proposition first, there is no allegation in the petition or in the amended petition that such a body known as the sinking fund commissioners of the school board was ever appointed. The allegation is, that no tender or offer was made to such a board, and such board did not, in fact, agree to take all the bonds or any part of them.

It is urged in argument, that, notwithstanding the fact that there was a want of such board, yet the statute, Section 7614, General Code, provides that upon failure to create such a board or appoint such a board, the law designates the board that shall act in place of such board, and it is claimed in argument that the language of the statute wherein the word "may" is used, should be construed as meaning "must" or "shall," and that the provision is mandatory. It is also claimed that upon the failure of appointment or creation of such board, that the board of education of the city district shall act as such commissioners.

Now, I can not yield to that construction. The language of the section providing for this board, after designating how the

board of commissioners shall be selected and appointed, continues:

“Except that, in city or village districts, the board of commissioners of the sinking fund of the city or village may be the board of the school district.”

My contention is that the designation here is, that the sinking fund commissioners of a village or city shall constitute such commissioners. True, the statute providing for the board of sinking fund commissioners of a city or village does not designate them as commissioners, but as trustees; their functions are the same, and as I interpret this statute, it means those trustees.

I am also so satisfied from a further reading of the language in this section of the statute: “Such commissioners shall serve without compensation and give such bond as the board of education requires and approves.”

Now, it seems to me that the Legislature did not intend that the board of education should be such board of commissioners of the sinking fund and fix their own bond; that it meant that whoever should serve in that capacity their bond should be accepted in the amount fixed by the board of education. It would be an anomaly that an officer or the board itself should designate the amount of security it should give and approve its own security. I do not recall an instance where such a provision is made.

In the case of the board of commissioners of the county, or officers of the county or officers of the city, where bonds are required, the statute points out some specific body apart from them who shall fix and determine the bond and approve it. So that whether we construe this provision as being mandatory or permissive, so far as this case here is concerned, would make no difference; for plainly, if the court is right in the construction of this statute, and the language is mandatory, and the trustees of the sinking fund of the city shall be the trustees of the sinking fund of the board of education, there is no allegation made that they were not offered these bonds and that they declined to take them; there can be no presumption but that

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the law has been complied with, even though it was mandatory; so that, so far as the question presented by the amended petition is concerned, the court is constrained to hold that for this reason, there was no violation of the law in the offering of these bonds for sale.

Coming now to the real question, as I consider it, involved in this case, whether or not the law requires the publishing of this resolution, if it does so require it, it must be under Section 4227, General Code, because neither provision of the law and in no other general provision of the code do I find any command with reference to the publication of any ordinance or resolution. True, many sections of the statutes that have been read before me seem to recognize, or do recognize apparently that as to some resolutions at least there must be a publication thereof. There are many sections of the statutes, without referring to them, which do in terms provide that the resolutions mentioned in said sections shall be published; so that there are provisions of the law with reference to certain resolutions of which the law requires a publication. It is conceded that the statute providing for the resolution that we are now interested in and investigating does not contain any positive language or declaration that that resolution shall be published, and if it must be published, we must look elsewhere than to the section providing for the resolution itself.

Section 4227, General Code, provides that:

“Ordinances, resolutions and by-laws shall be authenticated by the signature of the presiding officer and clerk of the council. Ordinances of a general nature, or providing for improvements shall be published as hereinafter provided before going into operation.”

It will be noted that the language of this section reads, “Ordinances of a general nature, or providing for improvements shall be published,” etc., and the language is confined to ordinances.

Section 4224, General Code, provides, “The action of council shall be by ordinance or resolution, and on the passage of each ordinance or resolution the vote shall be taken by ‘yeas’ and

'nays' and entered upon the journal," etc., and then the further language, "No by-law, ordinance or resolution of a general or permanent nature, or granting a franchise, or creating a right, or involving the expenditure of money, or the levying of a tax," etc., shall be passed, etc., unless by a certain provision the rule is suspended.

Now it will be noted, the language is, "Ordinance or resolution of a general or permanent nature." That means that there are two kinds—it may be an ordinance or a resolution of a general nature, or it may be one of a permanent nature, or they may be both general and permanent; but the requirement as to publication is only of an ordinance of a general nature; there is no requirement as to its publication under this section of a permanent ordinance not of a general nature.

Now, with this distinction between matters of a general nature and of a permanent nature, is fully recognized in the case of *Elyria Gas & Water Co. v. Elyria*, 57 Ohio St., 374, to which my attention has been called, the Supreme Court of the state, after discussing the nature of the resolution involved in that case which was one similar to this, say that it is not only of a general nature, but it is also one of a permanent nature; so that they recognized that in that particular case, it was both of a permanent and of a general nature, but that there are ordinances and resolutions that, while they may partake of both natures, yet they may be separate—they may be general in their operation and not permanent, or permanent in their operation and not general. The language here is, it is that only when of general nature publication even of ordinances is required.

It has been urged that resolutions at least of this nature, and resolutions generally, are in fact, ordinances. In a broad sense, it is probably true that they might be designated as ordinances—the term "ordinance" is the broader term, undoubtedly. There is no abstract reason why an ordinance need be published at all. An ordinance is like a statute enacted by the Legislature of the state; there is no rule of law that requires a statute enacted by the Legislature of the state to be published. It is

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supposed that the people of the state will take notice of the enactments of the Legislature, and there is no reason in logic why an ordinance of a village or city, which is, in fact, a statute enacted by a governing body in a community, should be published at all, except that the law requires it to be done. We might well suppose that a community interested in the acts of its council, were as much bound to take notice of the legislative acts of its body, as the citizens of the state are bound to take notice of the acts of the General Assembly, and were it not for the specific direction of the statute, I do not know of any matter of public policy, or of individual requirement, that compels the acts of legislative bodies to be published at all for the benefit of persons who are subject to the dominion of such body, and when the Legislature enacts a provision governing municipalities, it is supposed to do so in the purview of common knowledge that a community governed by a council might well be supposed to take general notice of the acts of that council, and it is only where there is an express provision requiring publication of a notice, that publication is required.

Now, in Section 4227, General Code, it is solely "an ordinance," that requires publication as I have said before. It is argued that a resolution is an ordinance. That may be true, and yet the Legislature of the state has seen fit to enact that ordinances shall be set forth in certain formulated words and has decreed the form and provided in what form ordinances of cities and villages shall be; and while it may be said that this is merely directory, yet it indicates that the Legislature designates an ordinance as a different thing from a resolution.

The General Assembly is a legislative body and frequently enacts resolutions that have the force and effect of rules; the Legislature enacts joint resolutions of both bodies, and resolutions of each body and yet they are not statutes and are not enacted as such, but they are resolutions of such body and recognized as such and fulfill the purpose of resolutions. It seems to me that we should receive the accepted significance used in common parlance, when considering the acts of bodies like this.

I might say, in passing, that county commissioners have the power to enact rules and regulations the violation of which may be visited by penalties, as for instance, such as relate to improved roads—they may provide that wagons carrying certain burdens shall be used with tires of certain widths, and if this rule is violated, penalties can be enforced for the violation of these rules and regulations; and yet persons who are interested, must take notice of those rules. There is no provision for their publication.

A resolution ordinarily is a declaration of a council, or a legislative body evincing some purpose or intent to do some act not the doing of the act itself. Ordinarily it is the intention to enter upon some enterprise of public moment, something authorized by law that it may do. An ordinance ordinarily provides a rule of conduct and is a law binding upon a community. They are declarations of a rule of conduct for the enforcement of a right or the creation of a duty. They are not similar and not accepted as such, so that I do not believe, when the Legislature used the word "ordinance" that ordinances of a general nature should be published, it embraced within the purview of such section a resolution of a general and permanent character; and these various sections that I have been referred to, especially Section 3502, General Code, where it is said that a certain resolution for taking a census for classification of a municipality as a city or village, shall be published as other resolutions of a general character, do not impose the duty or obligation of publishing all resolutions; it may be that particular resolution which is to be published as other resolutions that are required to be published. It is recognized, in other words, by the Legislature, that there are some resolutions that the law required to be published, but it is not the rule that all resolutions of every nature shall be published, but that some must be published, I think that is all that can be claimed for it.

It was argued before me that the case of *Johnson v. Elyria*, 6 N. P., 372, decided by the Common Pleas Court of Lorain County, determines the question involved here in favor of the

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plaintiff and should such decision be followed, would be decisive in its favor. I am not disposed to follow the case, nor do I believe that the contention of counsel is correct. Certainly, the statute, as quoted by the court in its decision upon page 370, wherein it says, "Section 1695, Revised Statutes, provides 'All by-laws, resolutions and ordinances of a general nature must be published, and that no ordinance shall take effect until the expiration of ten days after the first publication,' " if such section of the statute contains such language, the decision of the court might well have been sustained. No such language is contained in the present statute under review and I submit that it was not contained in the statute in force at that time, but that it was an interpolation therein by the court.

Entertaining these views, I must find that there was no requirement under the law that this resolution should be published and that the issue of these bonds was not illegal, and for the reasons assigned, the demurrer will be sustained.

**FAILURE OF CITY OFFICIALS TO MAKE FINAL ESTIMATE
FOR COMPLETED WORK.**

Common Pleas Court of Hamilton County.

WARREN BROS. CO. v. CITY OF CINCINNATI.*

Decided, 1912.

Municipal Contracts—Contractor Entitled to Interest Where there is Delay in the Final Estimate—Not Limited to Mandamus to Compel Payment—Compliance with the Requirement that All Bids Embracing Both Labor and Material be Separately Stated with the Price Therefor—Bond as a Condition Precedent to City Accepting the Work

1. Failure of city officials to make a final estimate on completed work or to take the necessary steps leading up to settlement of the claim

*Reversed by the Court of Appeals, and judgment of Court of Appeals reversed by the Supreme Court on grounds stated in the journal entry. 92 Ohio State.

- of the contractor within a reasonable time creates liability on the part of the city for interest on the fund so withheld.
2. A contractor who is unable to obtain a final settlement from a municipality is not limited to an action in mandamus to compel the officials to perform their duty, but if he so elects, he may have recourse to an action in tort for damages.
 3. A bid of a public contractor for a street improvement, containing twenty items, one of which and a fair sample of the other items being "Curbs, 5 inch granite, per lin. ft., one dollar and thirty cents, \$1.30 cts," sufficiently complied with Section 4329, General Code (143 Municipal Code, old section), requiring all bids embracing both labor and material to be separately stated with the price therefor.
 4. A clause in a bond required by the city to be executed by the contractor as a condition precedent to the city accepting the work and executed for the purpose of protecting the city from all damages resulting from accepting the work, which clause provided "It being understood that the execution of the bond shall in no wise prejudice the rights, if any, which the contractors may have to interest on the contract price for said work from the time of its completion," was a sufficient reservation of the question of interest, and therefore the contractor was not estopped to claim interest after accepting payment of the principal sum.

Louis B. Sawyer and Wm. A. Roudebush, for Warren Bros. Co.

E. M. Ballard, Dudley V. Sutphin and Geoffrey Goldsmith, City Solicitors, in common pleas court. Alfred Bettman and Coleman Avery, City Solicitors, in court of appeals. Walter M. Schoenle and Constant Southworth, City Solicitors, in Supreme Court, contra.

DICKSON, J.

This was an action for interest on delayed payments for work performed by plaintiff upon public work.

Plaintiff claims that on the 24th day of October, 1905, it entered into a contract with the city of Cincinnati to lay a bituminous pavement on one of its streets—Fairfax avenue; that the contract was fully completed on its part in December, 1905, and that as the work progressed certain partial estimates were made and paid for, amounting to \$9,514.72; that the defendant wrong-

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fully refused within a reasonable time after the completion of the work to make the certain final estimate, which was the basis for certain required steps in legislation by ordinance, etc., required in the contract and by law, leading up to and ending in final payment in full; that this final estimate was not made until on or about the 23d day of May, 1908, and when made was in the sum of \$43,341.97; that by the terms of the contract ten per cent. (\$4,480.88) was withheld, and that the balance (\$29,426.37) was paid in June and August, 1908; that these payments were by agreement made without prejudice to plaintiff's right to damages for delay in making the final estimate, as evidenced by a clause in additional bond required by the city to be executed by Warren Brothers on June 4, 1908, before the payment of the principal sum to protect the city from any damages that might result by reason of accepting the work on account of a non-compliance with contract, which clause provided "It being understood that the execution of the bond shall in no wise prejudice the rights, if any, which the contractors may have to interest on the contract price for said work from the time of its completion." The damages claimed being interest on the various payments thus wrongfully withheld, and amounting in all to the sum of \$4,111.85, the time covered being something over two years.

It was contended on the part of the city that it was not bound to make the final estimate and accept the work within a reasonable time, as the contract did not provide any time for accepting said work; that municipalities in Ohio are not liable for interest in the nature of damages for delay in payment for work performed; that it had no power to pay tortuous interest and that the contract was void because the bid did not comply with Section 4329 (143, Municipal Code, old section) requiring all bids embracing labor and material to separately state the price of labor and material.

1. The making of or refusal to make this final estimate raises squarely the issue in this action on this demurrer.

It was clearly plaintiff's duty to have finished the street in accord with the terms of the contract. It alleges it did this.

It was clearly the city's duty within a reasonable time after the street was turned over to it as completed to have accepted it and given the final estimate and at once to have begun the necessary legislation in the premises—or within such reasonable time to have refused so to do.

2. While it is true that a person dealing with a municipal corporation, a department of the government, must take notice that in many respects he deals differently than with another person, individual, and while it is true that many statutes have been passed by the General Assembly to protect the public from the evils of both omission and commission by its elected and appointed agents, yet it is also true that in the absence of such statutes a person may deal with it as with another person, and such person need not have recourse to the writ of mandamus to compel the city to do its duty, and it will not avail the city that such a person prefers an action in damages.

The failure of the city to do its duty by either accepting or rejecting the work alone makes it amenable to the cause of action set out in the petition; and if liable, damages as interest on the money thus wrongfully withheld is a proper remedy.

On the above two grounds the petition states a cause of action.

3. The city claimed further on demurrer that the contract was void because of non-compliance with Section 4329 (143, Municipal Code, old section), which provides:

“If the work bid for, embraces both labor and material, they shall be separately stated with the price therefor.”

The purpose of this law is to protect the public and to enable it to select the lowest and best bid.

Where shall the court draw the line between labor and material? What must be read into this law to make it intelligible?

One of the items, and a fair sample of the other items, in the contract in the petition herein, is:

“Curbs 5 inch granite per lin. ft. one dollar and thirty cents \$1.30-cts.”

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Where shall the court draw the line between labor and material in this item? There is labor in making the curb, labor in transporting it, and in setting it. The material is granite. Shall the contractor be denied pay for his work done and accepted because he has failed here to separate labor from material? What labor and what material is meant?

This court in this item is of the opinion that curb as a finished work is meant, and labor only is in the setting. But another court might hold otherwise. All laws should be definite and certain, and if they are not, then that one who seeks benefit thereunder should show that he has been honest and the other one dishonest.

The court is of the opinion that the plaintiff in this contract has substantially complied with the law, i. e., that it has honestly endeavored to comply with the law, and whether it has or has not complied is a question. When such a question arises it is best that the contractor have his pay, less what it would cost to make the owner whole, and unless the owner can show damage, the contractor may have his pay including interest for any delay therein.

The demurrer will be overruled.

[The court had previously overruled a demurrer by the city, urged upon other grounds. See *Warren Brothers Co. v. Cincinnati*, 7 O. L. R., p. 542.]

Judge Dickson, later deciding the case on final submission upon demurrers, briefs and agreed statement of facts, a jury having been waived, held:

"The judgment will be for the plaintiff and in an amount equal to the interest upon the payments withheld from January 1, 1907, being one year after the completion of the street.

"The reason for permitting interest only from year after the completion of the work is because the city had a right under the circumstances in this case to delay at least that long in the payments of the balances due on the contract."

The above decision of Judge Dickson was reversed by the court of appeals, case No. 5623, reported in the *Court Index* of November 24, 1913.

The Supreme Court, on March 23, 1915, reversed the court of appeals and affirmed Judge Dickson's decision of the common pleas without opinion (92 Ohio State), the journal entry reading:

* * * "It is ordered and adjudged by this court that the judgment of the said court of appeals be * * * reversed; and this court coming now to render the judgment that the court of appeals should have rendered, and it appearing that the city unreasonably delayed the payment of the money due the plaintiffs in error, and that at the time the principal sum was paid it was mutually understood and agreed, and expressly stated in the bond given by the contractors to the city, that the right of the contractors to demand interest by way of damages for the withholding of said payment should not be prejudiced by accepting payment of the principal sum, and it further appearing that the common pleas court allowed the city substantially one year in which to approve and accept or reject the work of the contractors, for which time it allowed the contractors no interest on the balance of the unpaid contract price.

"It is therefore ordered, adjudged and decreed by this court that the judgment of the common pleas court be, and the same hereby is affirmed."

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FAILURE OF CLERK TO ISSUE SUMMONS IN ERROR.

Common Pleas Court of Franklin County.

THE STARK ELECTRIC RAILROAD COMPANY V. FRANK E. MCKEAN,
CLERK OF THE SUPREME COURT, AND THE MARY-
LAND CASUALTY COMPANY.*

Decided, December, 1914.

Action on Bond of Clerk of Supreme Court—For Failure to Issue Summons in Error—Liability of the Clerk and His Surety—Manner in Which the Breach Should be Alleged—Averment of Legal Conclusion Rather than of Necessary Facts.

1. The petition in an action for breach of an official bond should set forth the essential terms of the bond in ordinary and concise language, without the attaching of a copy of the bond as an exhibit.
2. When a precipe has been filed in proper form by counsel in a case which has been taken to the Supreme Court, it is the duty of the clerk to at once issue a summons in error and transmit it by mail or otherwise to the sheriff of the proper county; and failure of the clerk to issue summons at all, or to issue it in proper time, renders him liable with his surety for any damage which may accrue to the plaintiff in error in consequence thereof.
3. In an action on the bond of the clerk, an allegation that he failed to issue or cause summons to issue is not objectionable on the ground that it is an alternative allegation; but the averment that "no summons was issued on said petition in error from the office of said defendant clerk within the time required by law," fails to disclose the facts upon which the suit is based, but is in the form of a legal conclusion and is subject to demurrer.

Webber & Turner and Arnold & Game, for plaintiff.

T. S. Hogan, Attorney-General, contra.

KINKEAD, J.

This is an action on the bond of the defendant McKean, as clerk of the Supreme Court, in which it is sought to recover damages for his alleged negligence in failing to issue summons in error. The plaintiff prosecuted proceedings in error in the Supreme Court to reverse a judgment rendered against it for

*For second opinion on demurrer, see page 599.

the sum of \$10,000 in the courts below. It filed its petition in error in the Supreme Court on May 29, 1913, at which time it alleges that it also filed with the clerk a precipe directing him to issue a summons in error to the sheriff of Mahoning county, to be served upon W. Noble Anderson, attorney of record for the defendant in error, returnable according to law, and to endorse thereon: "Proceeding in error to reverse the judgment of the circuit court in the above entitled action." It is averred that the petition and precipe were received by McKean on the above named date and that the plaintiff filed a transcript, the original papers and bill of exceptions with the clerk in the time required by law, and that it also filed the printed records and briefs as required.

It is then averred that the defendant, as clerk, "failed and neglected as directed in said precipe, to issue or cause summons in error to be issued thereon in said cause, to the sheriff of said Mahoning county, for the purpose of being served upon said defendant in error as and in the manner in said precipe directed." It is then claimed that the plaintiff suffered damages in the sum of \$11,372.52.

A general demurrer is filed to the petition, which is the matter now before the court. Some criticism is made of formal matters in the petition, one being that a copy of the bond is embodied in the pleading and attached to it as an exhibit, it being contended that this is sanctioned by no rule of pleading. The whole bond is copied in the pleading, formal parts included.

The rule of pleading in such cases is that an instrument may be copied into a pleading whenever that mode of stating the facts does not introduce such an averment of irrelevant matter as to obscure the issue, incumber the record and unnecessarily increase the costs. If, in stating a cause, it becomes necessary to substantially set out the whole or any part of an instrument, this may be done. *Swan's Pl.*, 198-200; *Crawford v. Satterfield*, 27 O. S., 421.

In an action on an official bond, all that need be stated in the petition is the terms and conditions material to the cause, that is, so much of the bond as will disclose the breach of duty upon

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which the cause of action is founded. This allegation may be made in the language of the bond, or it may be in the language of the pleader, setting forth the legal effect of the terms and conditions. Strictly speaking, the bond itself is evidence, the ultimate facts to be derived from its terms and conditions will consist in a deductive statement thereof. The common practice is to state such a cause in the language of the bond, although the rule of pleading the legal effect thereof is as proper now as under the old system.

The settled rule of practice forbids setting out a full copy of a bond, its formal parts, the oath and approval, because to do so is in violation of the requirements of the code that the petition shall plead the facts in ordinary and concise language (*State v. Collins*, 82 O. S., 240). Such instruments are not even properly attached to the petition as an evidence of indebtedness because it is not of that character within the meaning of the Code (*State v. Collins*, *supra*, p. 248). An action may be prosecuted on a certified copy of the bond (Code, Section 11242). The pleading should be reformed in these particulars, by pleading the essential terms of the bond in ordinary and concise language and omitting the copy attached as an exhibit.

The chief complaint made on the demurrer is as to the allegation of the petition that the defendant McKean "failed and neglected as directed in such precept to issue or cause summons in error to be issued thereon in said cause to the sheriff of Mahoning county."

There are two objections made to this allegation, one being that it is alternative, susceptible of two distinct meanings, and the other that it is insufficient because there is no duty on the part of the clerk to cause a summons to issue.

Considering the objection that it is an alternative allegation, the opinion is expressed that the words "or cause" do not make it subject to such claim, the court regarding such words as mere surplusage, meaningless and of no legal sufficiency or effect upon the question presented by the petition.

Concerning the contention made that the duty is upon counsel for a petitioner in error to cause a summons to issue, the court is of opinion that this is not well taken. It will be con-

ceded that the sole duty of filing a precipe with the clerk is upon counsel. It will be conceded that the doctrine announced long ago by Wright, J., in *State v. Caffee*, 6 Ohio, 150 is correct. It was there held that:

“A clerk of the court is not bound to issue process without a written precipe is filed according to the statute.”

When a precipe in proper form is filed by counsel in a proceeding in error, it is the duty of the clerk to at once issue the summons in error and transmit the same by mail or otherwise to the sheriff of the proper county. When such precipe is filed, the counsel and the plaintiff in error have performed all the duty that is required of them under the law, under ordinary circumstances and conditions. If, therefore, the clerk fails to issue such summons at all; or if he fails to issue the same in proper time so that the proceedings in error may be legally commenced within the time limited by statute therefore, and the action is dismissed by reason of the neglect of the clerk, there can be no doubt that he and his bondsmen are to be held for any damages that may accrue to the plaintiff in error. The circumstances disclosed by the facts of this case present an altogether different question from that involved in *McLarren v. Myers*, 87 Ohio State, 88, which is urged as a controlling authority here. The question involved in that case is altogether different from the one at bar. It was whether an action had been properly commenced or whether there had been an attempt to commence the action within the statute. In that case the time was nearly up within which the action could be commenced and this was known to counsel. Counsel also was advised that the clerk had been derelict in his duty in the issuance of a summons and had called upon the clerk at the last moment to urge him to issue the summons. The court observed, in deciding the case, that counsel ought to have waited and actually seen the clerk issue the summons instead of going away after requesting that it be issued and relying upon his promise. Further statement was made by Johnson, J.:

“But to the issuance of a summons, and as the burden rested on him to cause the summons to issue, it would seem that he

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should have remained in the clerk's office (under the urgent circumstances in which he was placed and which he stated to the clerk) and should have seen that the summons was *actually* issued."

The burden does rest upon counsel to cause the summons to issue, and his duty, as before stated, is fully performed when he files a precipe, unless the case is filed under such circumstances as were present in *McLarren v. Myers*. The rule of that decision has no application to the question now before us. It is entirely clear that when a plaintiff in error through its counsel has filed all the necessary papers with the clerk of the Supreme Court, including the precipe directing that a summons in error be issued, and thereafter complies with the law by filing printed records and briefs, and the proceeding in error is dismissed because of the failure of the clerk to either issue a summons at all or to issue one not in compliance with the precipe and too late to properly commence the action within the limitation of the statute, the clerk is shown to be negligent in the performance of his official duty and renders himself and his bondsmen liable therefor.

It can not be contended with reason in this case that it was incumbent upon the plaintiff in error or its counsel to actually see that the clerk performed his duty. Judicial notice must be taken of the fact that most of the business of this nature done with the clerk of the Supreme Court is by mail or express, it being impossible in the ordinary course of events for counsel to personally see that the clerk performs his duty. Especially is it unreasonable to contend that counsel should see that the summons in error is issued, because it is well known that all summons in error are transmitted by the clerk of the Supreme Court through the mails.

Hence the conclusion respecting the allegation complained of is that it is not objectionable in substance although the words "or cause are" improper in form and may be well omitted.

Objection is made to the following allegation in the petition: "that by reason of such default and neglect upon the part of the said Frank E. McKean, clerk as aforesaid, no summons was issued or served upon the defendant in error, or upon counsel

for defendant in error, or in the manner and form by law provided, within the time by law required." The objection is that this allegation is a conclusion and does not state any fact. It is well taken, because it fails to state the specific fact whether a summons was actually issued, or whether if it was issued whether it was in proper time.

There are other objectionable allegations contained in the petition. That made as to the filing of the bill of exceptions "as and in the manner by law required, and thereafter, and within the time by law required," etc. This fails to state the ultimate facts which will enable the court to determine whether all papers in the proceeding in error were filed within the time fixed by the statute.

Another allegation is as to the issuance of a summons as directed by the precipe, "and as required by law." This does not state a fact.

The allegation as to the proceeding for the dismissal of the proceedings in error, viz: "in that no summons was issued on said petition in error from the office of said defendant clerk within the time by law required as hereinbefore stated." This is a conclusion of law not stating any fact and is therefore improper. There is, in fact, nowhere in the petition a proper allegation of fact disclosing either whether any summons at all was issued, or if one was issued, whether it was issued within the time required by law. By reason of the fact that the foregoing allegations in the form of conclusions fail to state the especial facts, the court is of the opinion that the demurrer is well taken, and is therefore sustained.

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**NECESSARY ALLEGATIONS IN AN ACTION AGAINST A CLERK
FOR FAILURE TO ISSUE SUMMONS.**

Common Pleas Court of Franklin County.

STARK ELECTRIC RAILROAD COMPANY v. FRANK E. MCKEAN,
CLERK, AND MARYLAND CASUALTY CO.*

Decided, June, 1915.

*Damage Distinguished from Injury—Procedure for Determining the
Damage Resulting from a Default which Halted a Proceeding in
Error.*

In an action against the clerk of a reviewing court for failure to issue a summons in error, by reason whereof the plaintiff was deprived of his right to prosecute error, it is essential that facts be averred which will constitute a basis for damages by disclosing material or prejudicial error which would have entitled the plaintiff to a reversal of the judgment which he has been compelled to satisfy by reason of the negligence of the said clerk.

KINKEAD, J.

This action is again submitted on demurrer, this time to the amended petition. Plaintiff seeks to recover damages in the sum of \$11,372.52 for alleged negligence of McKean in failing to issue summons in error in an action prosecuted by it in the Supreme Court to secure a reversal of a judgment obtained by Laura J. Dinger by the action of the two lower courts, by reason whereof the same was dismissed. Plaintiff thereupon was compelled to pay the judgment, and now seeks recoupment against defendants.

The gist of the cause disclosed by the averments is that by reason of the default and neglect of McKean in failing and neglecting to issue summons, plaintiff was compelled and did pay to Laura J. Dinger the sum of \$10,915 and costs amounting to \$457.52. Therefore it is claimed that plaintiff is damaged in that sum.

It is contended on behalf of the demurrant that the petition is insufficient for the obvious reason that the plaintiff does not show that it has been damaged by the negligent act of the de-

*For first opinion on demurrer, see page 593.

fendant clerk of the Supreme Court. It is argued that the petition must contain an averment that there was error in the proceedings of the court of common pleas, and of the court of appeals in the rendition of the judgment against it. It is said that there is a presumption of law that the decisions of these courts are correct.

On the contrary, and in behalf of the plaintiff, the attitude seems to be that the essential allegations merely are the course of the proceedings, the neglect of the clerk, and the final payment of the judgment.

The question is novel and important, though not difficult, if the reasoning faculties are directed towards the familiar lines of the proceedings of an action from its commencement to its termination in the court of last resort. The mental attitude of judicial arbitrament toward the question presented here, must be the same as that in awarding the judgment against plaintiff in the other action. It may not reasonably be contended that the clerk is liable to pay plaintiff the sum of \$11,372.52, the amount of the judgment, merely because he neglected to issue summons in the proceeding in error. The argument presented fails to distinguish between *damage* and *injury*.

In determining rights and causes, the *primary right*, the corresponding *duty*, and *injury* are the sole factors to be considered. *Damage* follows *injury* in natural sequence, not being of primary essence of the right and injury, but rather follows as an incidental result.

When a primary right is violated, the law at once recognizes that an injury is done, the scope and extent thereof measured in dollars by way of damages being an incident and not an essential of the cause of action.

From the adjective viewpoint, a cause of action consists of the bare statement of the ultimate facts disclosing a breach of duty by the defendant. Duty and right, however, are found in substantive law, and are not stated in the pleading. The facts alleged in the petition under consideration, discloses the breach of duty by the defendant in failing to issue summons in error. This negligence of the defendant deprived plaintiff of a right.

What is the scope and extent of the right? It is to have its

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case reviewed on error by the Supreme Court to the end that it may have it determined whether errors of law intervened in the action of the courts below to the material prejudice of the plaintiff.

If no errors were committed by the lower courts which were prejudicial to the rights of the plaintiff in that proceeding, the violation of a duty by defendant concerning the issuance of summons has not infringed a substantial procedural right resulting in injury.

It may be reasoned that the full scope and extent of the primary right of plaintiff to have its cause reviewed on error in the Supreme Court, comprehends the right to have corrected only prejudicial errors committed by the courts below, those material to its rights. That constituted plaintiff's right under the law, no more, no less. So does it not seem logical therefore to assume, that in the statement of the ultimate facts showing the neglect of defendant, facts should appear, disclosing prejudicial errors committed by the courts below, in the case in which judgment was rendered against plaintiff here?

It is apparent that these thoughts were present in the mind of Judge Taft in his opinion in *B. & O. R. R. Co. v. Weedon*, 78 Fed., 584, when he states:

"The defendant may be obliged to submit to the court, the record in the first case, to decide whether there was reversible error."

Stored away among the books and decisions there is a rule that it is actionable to deprive a man of a right given him by law, although no damage, loss or injury has been thereby occasioned (*Ashby v. White*, 1 Smith's L. C., 356; 1 Eng. Rul. Cas., 521). On the other hand there are instances where the question whether a right has been infringed, or not, is made to depend upon actual damage being done, as in libel or slander, and in some cases of fraud. But the rule of precedent since probably 1826, in England and in this country, has been that in an action for negligence, the cause of action is the breach of legal duty alleged (*Howell v. Young*, 5 B. & C., 258; *Kerns v. Schoonmaker*, 4 Ohio, 331). Duty and right are correlative and be-

long to substantive law, while the formal statement of the ultimate fact lies within the field of adjective law.

Applying the principles thought to be controlling in *Bilkin v. Columbus Railway & Light Co.*, 10 N.P.(N.S.), 561, as determining factors of the essence of a cause of action, its dual aspect in substantive and adjective law is to be considered.

The right of plaintiff to complain in his case is to be measured by fact and law, whether it had the right by its proceeding in error in the Supreme Court to have the judgments of the lower courts reversed. That is its substantive right in law. To disclose a violation of such right, it will not be sufficient simply to allege that one Laura J. Dinger recovered a judgment for \$10,000 against plaintiff, in the common pleas court, that the same was affirmed by the court of appeals, and that its proceeding in error was dismissed in the Supreme Court by the neglect of defendant to issue summons.

In addition to this it must be shown that both a substantial procedural and substantive right was injured by the violation of duty by defendant. Looking to the law of the state as found in statute and decision, it is known that the burden is on a plaintiff in error to show prejudicial error before there can be a reversal. Errors and defects which do not affect substantial rights are disregarded. If the court is of the opinion that substantial justice has been done to the plaintiff in error, all alleged errors occurring at the trial must be disregarded, and the judgment affirmed. Section 11354, General Code.

This becomes a part of the *right* of one who prosecutes error. It is clear, therefore, that the presumption is that the judgments of the lower courts were not prejudicial. So that presumption must prevail in this action.

The conclusion must be that to warrant recovery in a cause of action for neglect of a clerk of a reviewing court to issue summons in error, by reason whereof the plaintiff in error was deprived of his right to prosecute error, it is essential that he aver such facts pertaining to his right as will disclose material or prejudicial error by the courts below, entitling him to a reversal. That would present the anomalous situation wherein the trial court must determine whether another trial court and an

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appellate court has committed error. But such is the necessity. There may in such case be a review of the whole matter.

Sufficient facts should therefore be alleged as will enable a trial court to determine whether there was prejudicial error. This is a judicial question, and is to be determined in the first instance by the petition.

The following decisions bearing on the question are cited in support of the demurrer: *Huston v. Wandeloehr*, 14 S. W., 346; *State, ex rel, v. Fleming*, 24 N. E., 664; *Symms v. Cutter*, 59 Pac., 671; *Engine Pump Co. v. Lindville*, 23 Pac., 597; *U. S. Fidelity, etc., Co.*, 186 Fed., 477; *U. S. v. Bell*, 127 Fed., 1002.

Those cited by plaintiff: *B. & O. R. R. Co. v. Weedon*, 78 Fed., 584; *Farmers & M. Bank v. Mains*, 183 Fed., 37; *Carpenter v. Warner*, 38 O. S., 416; *Heatman v. Shriner*, 15 O. S., 43.

There is little reason or logic in the view that facts showing mere violation of official duty, that do not *prima facie* disclose injury to plaintiff's whole right in a proceeding in error, will throw the *onus* on the officer to show want of infringement of substantial right as well as injury.

The learned judge in *B. & O. R. R. Co. v. Weedon*, 78 Fed., 584, recognized the fact that the value of the plaintiff's right depends upon the probability of a reversal, and the successful event of a new trial.

Not only is it essential that prejudicial error sufficient to warrant reversal be made to appear, but it will be necessary to adduce evidence to show that on a second or retrial a verdict would probably not be rendered against plaintiff.

The court in the case last cited was of opinion that "the amount of injury is *prima facie* measured by the face of the judgment" and that the burden is on the clerk to show that the complainant would have had ultimately to pay the same amount without regard to his negligence. Furthermore if the facts are controverted. and the law applicable thereto dependent upon the ultimate finding by the triers thereof, it is difficult to perceive any warrant in speculation concerning them.

This court can not accede to such a view, because it confuses *damage* with *injury*.

As a matter of law the plaintiff can not have his case submitted to the jury until it shall have satisfied the court that there was prejudicial error. This must appear first in the petition, then upon evidence, at which time the court may or may not submit the case to the jury. If at trial the court is satisfied that there was prejudicial error, the cause will then be submitted to the jury for it to determine the amount of damage plaintiff probably suffered. This will depend upon the further fact whether the jury is of the opinion that a verdict should not have been rendered against the plaintiff in the other case. If it should be of the opinion that a verdict for either the amount before rendered against it, or for some other amount, then plaintiff has not suffered any injury, and is therefore not entitled to recovery of damages. It is questionable whether a jury to which this case might be submitted, may decide the facts in the other case. This is the only way in which a conclusion may be reached in this case.

The statement of the amount claimed as damages is therefore, as it is in most cases, of little consequence. It certainly is not of the essence of the cause of action.

Some difficulty may be encountered in complying with this rule in the statement of prejudicial errors. It should not be done as in *B. & O. R. R. Co. v. Weedon*, *supra*, as they were there set forth in the form of legal conclusion.

The demurrer will be sustained. The court will entertain a motion for leave to file a second amended petition in compliance with the views herein expressed, in presentation of such amended petition.

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ATTEMPT TO THWART A DECREE FOR ALIMONY.

Court of Common Pleas of Hamilton County
(Division of Domestic Relations).

LILLIAN MAY DANIELS V. WILLIAM FRANCIS DANIELS.

Decided, July, 1915.

Alimony—Nature of a Judgment for—Attempt of Defendant to Defeat the Order of Court with Reference thereto by Transfer of His Business Interests to a Corporation—Facts Connected therewith Set forth in a Supplemental Petition—Half Interest in the Property Awarded to Plaintiff, and Said Interest Restored to Her.

An attempt to frustrate an order of court and defeat its judgment for alimony through the organization by the defendant of a corporation and transfer to it of the business enterprises being carried on by him, after the court had intimated to counsel that a decree for alimony would be allowed to plaintiff and an equal division of the property ordered, but before a decree carrying into effect the intention of the court had been entered, constitutes fraud and deceit. The acts of the corporation in such a case will be treated as the acts of the defendant, and the plaintiff may proceed by supplemental petition to secure an order for the assignment and transfer to her of all the right, title and interest in said property awarded to her by said decree.

H. E. Engelhardt and R. M. Ochiltree, for plaintiff.

Joseph W. O'Hara and M. C. Lykins, contra.

HOFFMAN (Charles W.), J.

On May 4th, 1915, Lillian May Daniels, the plaintiff, was granted a decree of divorce in this cause from William Francis Daniels, on the ground of extreme cruelty.

In respect to the alimony allowed the wife the decree provided as follows:

“And the court find that the plaintiff and defendant are the joint owners of a business consisting of a dairy lunch room and leasehold at No. 114 East Fourth street, Cincinnati, Ohio, and a four-fifths (4-5) interest in a dairy lunch room and leasehold at No. 334 West Fourth street, Cincinnati, Ohio, and the court

further find that the said plaintiff and defendant on or about the 22d day of January, 1915, had in bank the sum of \$8,000, which sum of money was their joint property and of which the plaintiff on said 22d day of January, 1915, received the sum of \$3,150.

"It is further ordered and adjudged that the said plaintiff have, possess and enjoy as and for alimony the following described personal property with the right to use, sell or dispose thereof at her pleasure, viz.: all of the right, title and interest of the defendant in and to the business of the said dairy lunch room and leasehold at No. 334 West Fourth street, Cincinnati, Ohio; and the defendant is ordered to transfer to the plaintiff all his right, title and interest in and to said dairy lunch room and leasehold at No. 334 West Fourth street, Cincinnati, Ohio, free, clear and unencumbered of any liens or obligations, except rental under said leasehold from and after May 1, 1915, and this decree shall operate as a full and complete transfer and assignment thereof to the plaintiff; and it is further ordered that the defendant pay to the plaintiff the sum of \$1,000 in cash, and the same is hereby made a lien upon all of the property of the said defendant. And in default of any such payment for three days, execution is allowed to issue therefor. And it is further ordered that the defendant deliver to the plaintiff all her wearing apparel and all the household and kitchen furniture which was located in the flat at No. 340 West Fourth street, Cincinnati, Ohio, occupied by the plaintiff and the defendant prior to the filing of the petition herein for divorce and in default of delivery of said household furniture and wearing apparel by the defendant to the plaintiff for three days, execution is allowed to issue thereafter."

The hearing in the divorce proceedings closed on or about April 20th, 1915. A few days previous to May 4th the court advised the counsel of both parties that the plaintiff would be granted a decree and that the plaintiff should receive as alimony one-half the property.

The court further indicated to counsel that it was its intention to give the plaintiff the store at No. 334 West Fourth street, and all the household goods in the flat at No. 340 West Fourth street, and further that the plaintiff should receive an amount of money sufficient to effectuate an equal division of the property. The court finds that the parties and their counsel understood that which the court intended should be incorporated in the decree.

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On the fourth day of May, before the decree was filed, Mr. M. C. Lykins, the counsel for the defendant, telephoned the court stating that he thought the decree impracticable, and that it could not be enforced.

On April 26th, articles of incorporation of the Daniels Dairy Lunch Company were signed by W. F. Daniels, the defendant; M. C. Lykins his attorney; Charles W. Davis, George S. Jackson and James Presly Tygret. The last two of whom, namely, Jackson and Tygret, were strong witnesses for the defendant in the divorce proceedings, and while Charles W. Davis was called by the plaintiff, his testimony was in fact in favor of the defendant. The said George S. Jackson and James Presly Tygret were employees of Daniels at the time of the trial and are employed by him at the present time.

Subsequent to April 26th there were the usual proceedings in the organization of the corporation. The certificate of subscription is dated April 29th and the organization and election of directors on April 30th. W. F. Daniels, the defendant, was elected president, treasurer and general manager of the company; M. C. Lykins, his attorney, was elected vice-president; and another of the incorporators was elected secretary.

The capital stock of the company was \$2,000. Daniels subscribed for sixteen shares; Lykins, one; Davis, one; Jackson, one; and Tygret, one.

The company took over all the property of William F. Daniels, a part of which was the dairy lunch store, owned by said Daniels at No. 114 East Fourth street. The said Daniels paid \$800 in cash for his stock and was credited with \$800 additional in payment for his property. Daniels testified that the other incorporators paid \$100 each. No books have been kept of the financial transactions of the company. The \$1,200 supposed to have been paid for stock was not placed in bank and the only evidence concerning it is the testimony of Daniels, who says he can produce it.

The business of the dairy lunch company is conducted by Daniels and his connection with the business of conducting the stores, etc., is in all respects the same as previous to the incorporation of the company.

The premises at No. 334 West Fourth street, in which the dairy lunch business was conducted, were held by William F. Daniels, the defendant, by virtue of a written agreement dated December 19, 1913. The premises, under the conditions mentioned in said agreement, were rented to said Daniels for a period of thirty-six months at a monthly rent of \$60.

On May 3d, 1915, one day before the decree was filed in the divorce proceedings, Mr. Lykins, acting ostensibly for the dairy lunch company, opened negotiations with the agent of the owners of the property at No. 334 West Fourth street for the purpose of acquiring that which was termed by Mr. Lykins, "the unexpired term."

On May 5th, 1915, these negotiations were continued. On the seventh and eleventh days of May Mr. Lykins, acting as he states for the company, sent telegrams to the owners as follows:

"Cincinnati, Ohio, May 7th, 1915. W. K. Benton, 328 Delfontaine street, Pasadena, Cal. The Daniels Dairy Lunch Company wishes to have the unexpired term of Fourth street premises, Central Trust Company and my letter to follow explaining. (sgd.) M. C. Lykins."

"May 11, 1915. W. K. Benton, 328 Delfontain St., Pasadena, Cal. The Daniels Dairy Lunch Company will pay seventy-one dollars per month if accepted. (Sgd.) M. C. Lykins."

Mr. Lykins did not keep a copy of the letter that he sent to the owners as per the telegram.

Negotiations were continued and finally on or about May 25th, the Daniels Dairy Lunch Company obtained an agreement from the owners substantially of the same character as that obtained by Daniels dated December 19th, 1913, with the exception that there was an increase of \$11 in the rent per month.

On May 10th, at a meeting of Mr. Engelhardt and Mr. Lykins, at the office of Mr. Lykins, a formal settlement was made of the matters contained in the decree and receipts given. The evidence discloses that Mr. Lykins at that time advised the counsel for the plaintiff that the furniture was in the house and had not been removed.

The court had intimated that all the household goods of every character and description would be given to Mrs. Daniels, and counsel on both sides understood the intention of the court.

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Mr. Lykins advised his client, W. F. Daniels, that the words "household and kitchen furniture" had reference only to furniture in its narrow sense, and thereupon Daniels removed from the flat all articles, such as rugs, dishes, knives, forks, portieres, etc., not strictly furniture.

The proceedings in reference to the organization of the dair lunch company, and the negotiations in reference to acquiring a lease or agreement on the premises at No. 334 West Fourth street, were not communicated to the court, nor to the counsel for the plaintiff at any time previous to May 27th, when the dairy company served notice on the plaintiff to vacate said premises.

The plaintiff, Mrs. Daniels, is now in possession of the premises, the same having been formally turned over to her on or about May 12th, 1915.

The court finds that in the organization of the Daniels Dairy Company and the acts incident thereto, it was the intent and purpose of W. F. Daniels, under the guidance and direction of his attorney, M. C. Lykins, to fraudulently defeat and nullify the order of May 4th in reference to the store at No. 334 West Fourth street. It is true that these proceedings were begun previous to May 4th, but not before the court had intimated to all parties that it was its intention to divide the property equally and to give Mrs. Daniels the store at No. 334 West Fourth street.

On May 3d and May 5th, Mr. Lykins was in conference with the agents of the owners in reference to the leasing of the store. That Mr. Daniels and Mr. Lykins intended to defeat the order of the court is evidenced, in a measure, by the fact that they took all the household goods not strictly furniture, well knowing that the court intended that all the goods in the flat should become the property of Mrs. Daniels.

When Mr. Lykins read the decree before its filing and notified the court it was impracticable, he certainly knew at the time that the court did not construe household and kitchen furniture as meaning furniture in its strict sense.

The defendant, Daniels, and Mr. Lykins claim justification on the ground that all their acts were legal and that under the law they had the right to do that which they did do in reference

to the incorporation of the company, the acquiring of the lease on the premises and the taking of the household goods. Whatever may have been their opinion in reference to the legal phase of their acts, it is clear that such acts constitute fraud and deceit taken in connection with the decree for alimony and the facts of this case.

Alimony is not an ordinary asset. It is property, but not in the broad and general sense in which the term is used. It is property set aside for the specific and definite purpose of supporting and maintaining the wife. It can not be applied toward the payment of the debts of the wife incurred before the decree was filed. It is not an equitable asset that may be reached by creditors. It is "not a debt within the purview of the constitutional inhibition against imprisonment for debt." "It is a specific fund provided for a specific purpose with restraint and limitation written all over its face by the very law and decree which brought it into existence." The state is interested in the award for alimony in that the wife may not become a burden on the public; the fund, therefore, on considerations of public policy and equity will be protected. The obligation of the husband to protect the wife continues after the divorce, and the decree usually provides for this support and the state will not permit interference with the means of support by an antecedent creditor or the husband who seeks to nullify the provisions of the decree granting such support. *Fickel et al v. Granger*, 83 O. S., 101; *State v. Cook*, 66 O. S., 556; *Romaine v. Chauncey*, 129 N. Y., 566.

The court has found that the incorporation of the Daniels Dairy Lunch Company was for the fraudulent intent and purpose of defeating the decree of May 4th, therefore Daniels and his associates can not shield themselves under the corporate entity. As fraud vitiates that into which it enters, the acts of the corporation must be considered, in the present instance, as the acts of the defendants individually. *Brundred v. Rice*, 49 O. S., 640; *State, ex rel, v. Standard Oil Co.*, 49 O. S., 137; *Bank v. Trebaine*, 59 O. S., 316.

This cause is now before the court on a supplemental petition, answer and reply. Counsel for defendant contends that the

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decree for alimony is final and therefore can not be modified. The court is of the opinion that there is no question of modification of the decree of May 4th now before the court, and therefore the cases cited by the defendant's counsel are not applicable to the issues in the case at bar, which issues as conceived by the court are that by fraudulent acts or a series of acts both before and after the decree was entered, the defendant, Daniels, and his co-defendants, are attempting to frustrate the orders of the court and defeat and nullify the decree. The court at a former hearing on a motion to modify the decree refused to do so, and therefore that question is adjudicated. The court, too, is of the opinion that so long as the parties in the original divorce proceedings are involved in the present case the plaintiff need not bring an independent action, but may proceed by way of supplemental petition, setting forth the facts upon which she bases her prayer for relief.

The court finds that the receipt of May 12th was signed by the attorney for the plaintiffs in total ignorance of the acts and purposes of Mr. Daniels and his attorney as therein mentioned.

The court is of the opinion that the lessors of the premises could legally agree with W. F. Daniels to terminate the agreement of December, 1913, and sign and execute the new agreement of May 25th, 1915. The lessors are not parties to this cause and for want of jurisdiction no order concerning them can be made. The lessors were justified in their belief that W. F. Daniels was the only one concerned in the agreement of December, 1913, and Mrs. Daniels, who was unknown to them and not mentioned in the agreement, can not be made their lessee against their will and objections.

Under the agreement of May 25th, 1915, W. F. Daniels in fraud of the rights of plaintiff and under the name of the Daniels Dairy Lunch Company acquired the right and privileges and incurred the obligations as therein set forth. It is immaterial in this cause to determine the technical character of the lease, viz: to ascertain if it is a lease or a mere agreement. The fact is clear that Daniels, under guise of a corporation, has certain interests in the premises by virtue of this instrument.

The decree of May 4th can not be modified and W. F. Daniels restrained from doing that which is already accomplished; by virtue, however, of the power of the court to protect a decree for alimony an order can be made directing Daniels and his associates acting under the name of the corporation to transfer and assign to the plaintiff, Lillian May Daniels, now Lillian May Summersett, all of said estate and all rights and interests acquired under said agreement of May 25th, 1915.

The court further finds that all the co-defendants of Daniels knew of the fraudulent object and purposes of the organization of the Daniels Dairy Lunch Company, and that they permitted themselves to be used as the instruments by means of which Daniels could deprive his wife of alimony as provided by the decree.

It is therefore the judgment of the court that the defendants be perpetually enjoined from doing any act whereby the estate or interest acquired under the agreement of May 25th, 1915, may be forfeited, transferred or surrendered to any other persons than the plaintiff, and that the defendants be ordered to transfer and assign to the plaintiff all of said estate, right or interest in said premises under said agreement to the plaintiff, Lillian May Daniels, now Lillian May Summersett, and that the defendants be further enjoined from hereafter in any way or by any means whatsoever interfering with or acquiring any interest in the property granted to the plaintiff as shown by the decree of May 4th, 1915.

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Wagner v. Sheppard.

CONTRACT FOR SALE OF LAND.

Common Pleas Court of Franklin County.

M. ELLEN WAGNER v. LEANDER W. SHEPPARD ET AL.

Decided, October Term, 1914.

Vendor's Interest—Where He Holds Title, But Has Made a Contract of Sale—Equitable Lien Distinguished from Vendor's Lien—Action to Recover Under Contract of Purchase.

Under a contract for the sale of land, the vendor has an equitable lien on the land for unpaid purchase money, and he may resort to equity in the first instance to enforce his lien, without first bringing an action at law to recover the amount due.

Abernathy & Davis, for plaintiff.

J. V. Lee, contra.

KINKEAD, J.

The defendant and his wife gave a note for \$1,000 November 26, 1913, due and payable one year after date. At the same time they entered into a written contract with plaintiff for the sale of certain real estate for the consideration of \$3,400, which consisted of the note and the assumption of a mortgage indebtedness on the property in the sum of \$2,400 to the Centerburg Building & Loan Association Company. Defendant was to pay all taxes, keep the premises insured and pay all dues to the building and loan company. The deed of conveyance was to be made and delivered to defendant upon his compliance with all the terms and conditions of the contract, failure so to do rendering it null and void, entitling plaintiff to take possession of the premises.

This action is brought, first to recover judgment on the note; second, to have the rights and liens of all parties in interest adjusted, and to have the premises sold.

It is contended on behalf of plaintiff that she has a vendor's lien.

A general demurrer is filed to the second cause of action contained in the petition.

The opinion of the court is that the demurrer should be overruled, because plaintiff has the right in equity to have the contract specifically performed, to the end that on failure by defendant to perform his contract for the purchase of the property, judgment may be rendered against defendant for the amount due thereon, and the property ordered sold for the satisfaction of plaintiff's claim. This is an admitted course of procedure. The party may elect to pursue either his legal or equitable remedy. The theory is advanced in the petition that

"Owing to the possession of said premises by the defendant Leander M. Sheppard and the payment by him of some part of the consideration, said written contract may be regarded in equity as a mortgage for the balance due plaintiff and the fulfillment of the obligation of said Leander W. Sheppard under said contract, and that she has a right to have the equity of redemption of the defendant, Leander W. Sheppard, and his wife, Clara E. Sheppard, foreclosed."

Reference in the brief of counsel is made to *Jones on Mortgages*, Section 225, where the statement is made that the interest of a vendor who has given an ordinary contract for the sale of land, but retains title to the land in himself, is often spoken of as a vendor's lien. This is considered a misuse of terms.

In the vendor's lien, the grantor has parted with title, retaining the equitable lien for the purchase money. But a vendor who has merely made a contract for sale, not having parted with legal title, having it, has a substantial security.

Pomeroy, Section 1260, pronounces the designation of the rights of a vendor before conveyance as a vendor's lien as an unnecessary and an incorrect use of terms, because it confounds legal notions which are essentially different.

In the case of a contract of sale and for conveyance,

"Although possession may have been delivered to the vendee, and although under the doctrine of conversion the vendee may have acquired an equitable estate, yet the vendor retains the legal title, and the vendee can not prejudice the legal title, or do anything by which it shall be divested, except by performing the very obligation on his part which the retention of such title was intended to secure, namely, by paying the price ac-

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according to the terms of the contract. To call this complete legal title a lien, is certainly a misnomer. * * * In case of a contract for sale before conveyance, the vendor has the legal title, and has no need of any lien; his title is a more efficient security, since the vendee can not defeat it by any act or transfer even to or with a *bona fide* purchaser." Pomeroy, Section 1260.

The case of *Vail v. Drexel*, 9 Ill. App., 439, presents the true nature of the vendor's interest where he holds title but has made a contract of sale, in a very clear and instructive manner, though using the accustomed phraseology, viz.:

"Under an agreement for the sale of land, the vendor has an equitable lien on the property for unpaid purchase-money. In equity the vendee is considered the owner. The lien of the vendor is *in rem*, and he may resort to equity in the first instance to enforce it, without first resorting to a suit at law to recover the amount due."

See also *McCashm v. State*, 144 Ind., 151; *Moore v. Anders*, 14 Ark., 628 (60 Am. Dec., 551).

The exact positions of vendor and vendee have been described by English courts, as sustaining the relation of trustee and *cestui que trust*; "that is to say, when a man agrees to sell his estate, he is trustee of the legal estate for the person who has purchased it, as soon as the contract is completed." *McCreight v. Foster*, L. R., 5 Ch., 604, 610; *Shaw v. Foster*, L. R., 5 H. L., 321, 333.

Pomeroy, at Section 1261 Equity Jur., admirably expresses the doctrine of the decisions as follows:

"In fact, the position of the vendor prior to conveyance is defined and determined by the doctrine of equitable conversion, rather than by that of mere equitable lien. He holds the legal title as security for the performance of the vendee's obligation, and as trustee for the vendee, subject to such performance, and that title may be conveyed or devised, and will descend to his heirs. In equity, his real interest is personal estate; he becomes by equitable conversion the owner of the purchase-money, of which the vendee is his trustee, and this claim for the purchase-money passes on his death to his executors or administrators. On the other hand, the vendee becomes, by conversion, the real beneficial, although equitable, owner of the land; his

interest under the contract is, in equity, real estate, and descends to his heirs. The so-called lien of the vendor is only another mode of expressing his equitable interest thus arising from the doctrine of conversion; and so far as it has any distinctive signification, it simply means his right of enforcing his claim for the purchase-money against or out of the vendee's equitable estate by means of a suit in equity." See *Abbott v. Moldestad*, 74 Minn., 293 (73 Am. St., 348); *Hardin v. Boyd*, 113 U. S., 756; *Moser v. Johnson*, 88 Ala., 517 (16 Am. St., 59), and other cases cited.

The right of the vendor to proceed to enforce the so-called lien is simply an action to compel the vendee to make payment of the purchase price within a specified time, or else be barred of all rights under the contract—that is, an action to foreclose the contract. *Pomeroy's Eq.*, Section 1262.

In this case it is alleged that the property is not of sufficient value to satisfy the claim of the building and loan company and the indebtedness to plaintiff, that the defendants are insolvent, and the appointment of a receiver is asked.

This shows the necessity of equitable intervention.

The order is that the demurrer be overruled and that a receiver be appointed. The order is that defendants be compelled to yield legal possession of the premises at once, and that actual possession be yielded to the receiver within ten days from the date of the order, unless defendants pay a reasonable and proper rental for the use and occupancy of the premises. Max Goldschmidt is appointed receiver, with a bond of \$200.

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An ordinance requiring that all house drains shall be of either vitrified pipe or iron pipe, and if of vitrified pipe then encased in at least two inches of cement, is unreasonable and void. 190.

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A municipality which has adopted a charter under the home rule amendment to the state Constitution has the same power to legislate, through its council and within the provisions of its charter and the Constitution, as has the General Assembly to exercise such power. 337.

The test whether a municipality, which has adopted a charter, is acting beyond the scope of its authority must be determined by reference to the state Constitution, and not to acts of the Legislature. 337.

Under the provisions of the charter adopted by the city of Cleveland, an agreement may be entered into between the municipality and a street railway company whereby the latter may build a street railway line, under the conditions imposed by the said agreement, along a designated street or streets without first obtaining the consents of the abutting property owners. 337.

Bonds issued by a municipality must be first offered to the sinking fund trustees in their official capacity; if they have no money to pay for them it is their duty to decline them; where bonds are taken for the sinking fund without being paid for, no title passes and their surrender may be ordered. 465.

Validity of an issue of municipal electric bonds which were not first offered to the board of education in the absence of a board of commissioners of the sinking fund. 580.

A resolution declaring an issue of electric bonds necessary and fixing a date for submitting the question to the electors need not be published. 580.

Bond as a condition precedent to the city accepting completed work from a contractor. 587.

Failure of city officials to make a final estimate on completed

work, or to take the necessary steps for settlement of the claim of the contractor within a reasonable time, creates liability on the part of the city for interest on the fund so withheld. 587.

A contractor so situated is not limited to an action in mandamus to compel the officials to perform their duty, but he may have recourse to an action in tort for damages if he so elects. 587.

What constitutes sufficient compliance with the statute requiring all bids for labor or material to be separately stated with the price therefor. 587.

Contractor not estopped from claiming interest after accepting a partial payment of his claim. 587.

A municipality is estopped to deny liability under a contract where the work was done in accordance with the specifications and accepted. 481.

NEGLIGENCE—

Charged in the drawing of a check whereby it was "raised" without detection. 47.

Binding character of the custom, which in some cities has taken the form of a traffic regulation, that a vehicle following a street car must stop when the car stops to take on or discharge passengers. 81.

A chauffeur who drives his machine at the rate of twenty-five miles an hour between the curb and a car which has stopped to discharge passengers, is guilty of negligence so gross and palpable as to be clearly willful; whether he was acting at the time within the scope of his employment is a question for the jury; a detour of one mile held in this case not to have taken him out of the scope of his employment. 81.

Passenger preparing to step from car thrown and injured by the sudden starting of the car; passenger has a right to assume

that car will be brought to a full stop and he can take his stand on the step with safety, when. 356.

The negligence of the motorman in giving the car a sudden start forward, rather than of a passenger in taking his stand on the car step, is the proximate cause of the passenger being thrown off and injured, when. 356.

If a nuisance can be adequately compensated in damages the remedy is at law, but if irreparable in the equitable sense the remedy is in equity. 74.

Where a plaintiff alleges facts which constitute a nuisance causing injury to his property, and in a second cause of action alleges that the injury will be continuing and irreparable damage will result to his property unless an injunction is granted, the matter contained in the second cause of action must be regarded as a conclusion of law which the court will eliminate *sua sponte*, leaving plaintiff to sue at law for damages for the alleged injury. 74.

OFFICE AND OFFICER—

See CIVIL SERVICE.

The judge of a municipal court is a municipal officer. 33.

Discretionary and administrative duties of the county commissioners with reference to the compensation to be paid to deputies and assistants in county offices; power conferred upon a judge of the court of common pleas to make additional allowances; justification for such action. 369.

When the legally constituted counsel of a public board refuse to resist an action in which the board is vitally interested and special counsel are employed to make the defense, the board rather than its members in their individual capacity will be held liable for the fees of such counsel, particularly where no bad faith is shown and the members of the

board serve without compensation. 439.

Facts which it is necessary to aver in order to recover on the bond of a clerk of court; damages for failure to issue a summons in error. 593.

Duty of the clerk of the Supreme Court upon the filing of a precept in proper form; liable for any damages which accrue from his failure to issue summons or to issue it within the prescribed time. 593.

PARENT AND CHILD—

A parol agreement to make an adopted child an heir is unenforceable, even if established by satisfactory evidence, where the estate which the child claims many years later consists in part of realty and it does not appear that the agreement was taken out of the statute of frauds by part performance or a showing of fraud. 449.

PARTITION—

An infant may, within twelve months after coming of full age, question the validity of an order for the partition of lands in which he is a reversioner, where during infancy he answered through a guardian *ad litem* denying the plaintiff's right of action. 217.

Where land sought to be partitioned is held in part by the plaintiff in fee and in part as a life estate with infants as remaindermen, and a single improvement covers both parcels, a case of equitable partition is presented. 217.

In such a case the ordering of partition and consequent sale of the property is within the discretion of the court; where a partition would be to the advantage of the plaintiff and to the disadvantage of the infant remaindermen, an order for partition previously made will be vacated. 217.

PLEADING—

Adoption by reference is per-

missible only when appropriate. 74.

With reference to a nuisance which is injuring property; when an allegation as to the character of the resulting damages will be treated as a conclusion of law. 74.

A motion for leave to file an amended pleading will be overruled when the pleading tendered is clearly faulty in form or demurrable. 225.

Amendment asserting a different interest in support of plaintiff's right to contest a will, filed after a trial and finding against his original claim of interest, will be overruled as too late. 225.

In an action to recover under a policy of fire insurance, the setting up by the defendant company of separate defenses in each of which there is a general denial and a specific denial, the general denial will be considered as limited and restricted to such particulars as are pointed out in the specific denials, and the only issues tendered will be those raised by the specific denials. 273.

In an action against a bailee where the claim of the bailor rests on contract and the defense is based on loss by fire; not admissible to allege custom and usage with reference to care exercised by the bailee. 294.

Averment as to reason for delay necessary in an action for recovery on a demand note, presentment of which was delayed for a long period; otherwise the petition will be open to demurrer by an accommodation endorser. 377.

When issue of summons on a cross-petition is necessary. 401.

How an attempt to thwart a judgment for alimony may be brought before the court granting the judgment. 605.

PROMISSORY NOTES—

An endorser is released from liability by unreasonable delay in presentment, demand and notice;

three years held to have been an unreasonable delay; burden on holder to show cause for delay. 377.

Primary liability of one who signs on the face of a note. 561.

One who signs a note as an apparent maker and principal debtor, can not subsequently assert the contrary and thus affect his liability on the instrument, and a defense based on the privileges of a surety as they existed prior to the negotiable instrument act is open to demurrer. 561.

A release in writing for a valuable consideration in and of itself constitutes a defense under the negotiable instruments act; but no estoppel *in pais* is created by an oral statement of release, notwithstanding the accommodation maker acted on it to his prejudice, when. 561.

A promissory note is usurious, although drawing only eight per cent., when; a provision for an attorney's fee in case of suit for collection of the note also renders it usurious; under the Haas law such a note, together with the mortgage securing it, is void and in an action to enforce its payment a decree will be entered cancelling both the note and mortgage. 385.

PROPERTY RIGHTS—

In processes requiring skill, experience and knowledge. 529.

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Where shipments are made under the "uniform live stock contract," an agreement by employees of the company to render additional service in the form of care and attention to stock shipped is void, and an action to recover the value of hogs suffocated in transit through lack of such care does not lie against the company. 42.

RECEIVER—

Jurisdiction of the state court to confirm the account of its re-

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Where defendant pleads a release given by plaintiff's intestate in his lifetime, plaintiff may by motion require defendant to permit an inspection thereof. 331.

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The proceeding to contest a will is a statutory action in which the right of trial by jury exists by statutory sanction, and the scintilla rule and power of non-suit do not have specific application as in the original civil action. 124.

To warrant the submission of a will case to the jury the evidence must be such as to not only counter-balance the presumption of validity of the will but also must show lack of appreciation by the testator of his surroundings, of his property and his relatives and their deserts. 124.

When it is the duty of the court to enter up a judgment in favor of those sustaining the will. 124.

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